80-1169

No.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAULKNER RADIO, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The decision of the Federal Communications Commission, affirmed by the court of appeals, presented the following questions:

(1) Whether the Federal Communications Commission can deny an application for renewal of a broadcast station license because the licensee, in accordance with the provisions of Section 309(d) of the Communications Act, filed a petition to deny the application for a new broadcast station, which would be a competitor, on the ground the petition was filed primarily for the purpose of delay.

(2) Whether the Federal Communications Commission, in a license renewal proceeding, may find an applicant has been guilty of misrepresentation or other conduct on less than "clear and convincing" evidence* when such a finding will permanently disqualify it from being a broadcast licensee.

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*One aspect of the issue of whether an administrative agency's findings must be supported by clear and convincing evidence, rather than by a mere preponderance of the evidence, when the agency makes a determination which has the effect of permanently excluding an individual or corporation from the business regulated by that agency is currently before this court in *Steadman v. Securities and Exchange Commission*, No. 79-1266.

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No.

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FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Faulkner Radio, Inc., petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

PARTIES TO PROCEEDING

In addition to Faulkner Radio, Inc.[1] and the Federal Communications Commission, William P. Johnson and

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, it is noted that Faulkner Radio, Inc. is a closely held corporation with no subsidiaries or affiliates.

Hollis B. Johnson, d/b/a Radio Carrollton, were parties to the proceedings before the Federal Communications Commission.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit for which petitioner seeks review is *Faulkner Radio, Inc. v. Federal Communications Commission*, No. 79-1749 (October 15, 1980). That decision is not reported, but it is reproduced at pages 1a-2a of the Appendix.[2] The decision of the lower court affirmed decisions of the Federal Communications Commission, reported as *Radio Carrollton*, 72 F.C.C.2d 264 (1979), App. 3a; *Radio Carrollton*, 69 F.C.C.2d 424 (1978), App. 15a; and *Radio Carrollton*, 69 F.C.C.2d 1139 (1978), App. 17a.

Those decisions were reached after remand by the lower court in *Faulkner Radio, Inc. v. Federal Communications Commission*, 557 F.2d 866 (D.C. Cir. 1977), App. 36a, of the decision of the Federal Communications Commission in *Radio Carrollton*, 52 F.C.C.2d 1173 (1975), App. 59a, affirming the initial decision reported at 52 F.C.C.2d 1187 (I.D. 1974), App. 73a.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1980. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (1976).

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[2] The appendix (App.) to this petition is set forth under separate cover.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the First Amendment to the Constitution of the United States; Sections 309(d)-(e) of the Communications Act of 1934, as amended, 47 U.S.C. §§309(d)-(e) (1976); and Section 73.3584 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. §73.3584 (1979). These provisions are reproduced in the Appendix at 127a-133a.

STATEMENT OF THE CASE

Petitioner Faulkner Radio, Inc. ("Faulkner") is the licensee of standard (AM) Broadcast Station WLBB, Carrollton, Georgia. Petitioner is also the licensee of six other radio stations in Georgia and Alabama. On November 29, 1967, William P. Johnson and Hollis B. Johnson, doing business as Radio Carrollton ("RC"), filed an application with the Federal Communications Commission for authority to construct and operate a new standard broadcast station at Carrollton, Georgia. On June 18, 1968, Faulkner filed a Petition to Deny the RC application. Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §309(d)(1), provides that any party in interest may file with the Commission a petition to deny any application. Faulkner, licensee of a station with which the proposed RC station would be in direct competition for advertising revenues and listening audience, was clearly a "party in interest."

On November 15, 1972, the Commission designated for hearing the RC application for a construction permit and the Faulkner application for renewal of WLBB's license. Although the two applications were not mutually exclusive, the Commission determined that the factual disputes involved "inextricably connect[ed]" the applica-

tions and consolidated them for one hearing. *Radio Carrollton*, 38 F.C.C.2d 68, 69 (1972), App. 119a, 120a.

The Commission initially specified seven issues in the proceeding. Two of the issues specified against RC were raised by Faulkner in its original Petition to Deny. The only two issues specified against Faulkner were: 1) Whether Faulkner had filed its Petition to Deny for the purpose of delaying the processing of the RC application, and, if so, what effect that conduct had on the basic qualification of Faulkner to be a Commission licensee; and 2) Whether Faulkner or RC had misrepresented itself to the Commission in its affidavit recounting the details of the telephone conversation on June 20, 1968, between Thorburn, a Faulkner principal, and Johnson. *Id.* at 75, App. 126a. On October 18, 1973, the Review Board added an issue against RC to determine whether another party had a secret one-third ownership interest in RC and whether RC had been lacking in candor with the Commission concerning this interest. *Radio Carrollton*, 43 F.C.C.2d 472 (Rev. Bd. 1973), App. 115a.

The Administrative Law Judge's Initial Decision granted the RC application for a construction permit and denied Faulkner's application for renewal of Station WLBB. *Radio Carrollton*, 52 F.C.C.2d 1187 (I.D. 1974), App. 73a. This Decision was affirmed by the Commission on April 30, 1975. *Radio Carrollton*, 52 F.C.C.2d 1173 (1975), App. 59a.

Both the ALJ and the Commission found that Faulkner's principal, Thorburn, had made misrepresentations to the Commission in affidavits filed with the Faulkner Petition and supplements as well as in his testimony. Both also concluded that at least one of Faulkner's purposes in filing its Petition to Deny was to delay the RC application. The ALJ compared the filing of a

petition to deny for purposes of delay to the Commission's strike application policy. *Radio Carrollton*, 52 F.C.C.2d at 1227 & n. 37, App. 113a. In affirming the ALJ's Decision, the Commission stated that the ALJ's comparison of a strike application to a petition to deny filed for delay was "apt." *Radio Carrollton*, 52 F.C.C.2d at 1178, App. 64a. The Commission then applied the "guidelines" of its strike application policy to the Petition to Deny filed several years earlier by Faulkner and determined that Faulkner had filed a "strike" petition to deny, thus placing its own license in jeopardy.[3] *Id.* at 1178-80, App. 64a-66a.

In a collateral proceeding, the Commission has withheld action on the renewal applications of Faulkner's other six radio stations. In *Faulkner Radio, Inc.*, 61 F.C.C.2d 23, 25 (1976), App. 55a-57a, the Commission held that, in lieu of a hearing on those applications, its decision in *Radio Carrollton* with respect to WLBB would be "*res judicata*;" and it would afford Faulkner only an oral argument to determine whether the other six license renewals should be granted.

The decision in *Radio Carrollton* was appealed by Faulkner and was vacated and remanded by the United

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[3] The Administrative Law Judge's and the Commission's use of the analogy of "strike applications" as a basis for holding that a petition to deny becomes a strike petition when filed for delay purposes was completely without foundation. There is no constitutional right to influence another person to file an application, nor has it been decided that there is a constitutional right to file an application. *Whether or not the Commission's prior rulings on strike applications are valid, it is clear that the rights of Faulkner are completely different.* It is significant, however, that the Commission could find no other authority to support its action in this proceeding.

States Court of Appeals for the District of Columbia Circuit because of the conduct of the ALJ. The Court also expressed concern that the Commission's strike petition policy would have a "chilling effect" on other licensees desiring to file petitions to deny and stated that on remand the Commission would be "well advised to clarify its policy on strike petitions." *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 873-76 (D.C. Cir. 1977), App. 36a, 48a-54a. However, no reference was made to petitioner's arguments concerning the constitutionality of the Commission's findings on delay.

In its decision on remand the Commission affirmed its earlier finding that Faulkner was unqualified to remain a Commission licensee. *Radio Carrollton*, 69 F.C.C.2d 1139 (1978), App. 17a. It also formulated new standards for its strike petition policy, applied the new standards to Faulkner's petition filed ten years before, and concluded that Faulkner had filed its petition for the "primary and substantial" purpose of delaying the RC application. *Id.* at 1151-55, App. 29a-33a. Although the Commission acknowledged that two of the three issues in the original Petition to Deny and seven of the eight supplements thereto were *bona fide*, the Commission nevertheless concluded that Faulkner's Petition to Deny and the June 1970 Supplement thereto were filed to delay the grant of the RC application. *Id.* at 1154-55 & n. 30, App. 32a-33a. This, said the Commission, constituted a separate and distinct ground for denying the Faulkner renewal application. *Id.* at 1155, App. 33a.

In evaluating the evidence on remand, the Commission repeatedly and consistently approached its evaluation as an appellate court would, reviewing its earlier decision and affirming it because it was supported by "substantial evidence." *See Id.* at 1143-48 & n. 23, App. 21a-26a.

However, on June 28, 1978, after the oral argument in *Sea Island Broadcasting Corp. of S.C. v. FCC,*[4] in which the Commission's use of the term "substantial evidence" in the decision on remand in *Radio Carrollton* was criticized, the Commission issued a "*sua sponte* reconsideration" of its May 18 *Order*, stating that "in using the inclusive term 'substantial' we meant there was reliable and probative evidence in the record which clearly satisfied the customary preponderance of the evidence standard. . . ." *Radio Carrollton*, 69 F.C.C.2d 424, 425 (1978), App. 15a, 16a.

The Commission again considered the WLBB renewal on petitions for reconsideration filed by Faulkner. *See Radio Carrollton*, 72 F.C.C.2d 264 (1979), App. 3a. In its decision on reconsideration, the Commission reaffirmed its decision on remand and further clarified its strike petition policy, defining a strike petition to deny as one filed with the primary purpose to delay. *Id.* at 271 & n. 10, App. 10a.

The decisions were appealed by Faulkner and affirmed by the United States of Appeals for the District of Columbia Circuit without opinion. App. 1a.

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[4]The oral argument in *Sea Island Broadcasting Corp. of S.C. v. FCC*, No. 76-1735, was held on June 2, 1978, two days after the Commission's decision on remand was released. The Court of Appeals' decision in *Sea Island* was released on January 14, 1980, and is reported at 627 F.2d 240 (D.C. Cir. 1980). Certiorari in the *Sea Island* case was denied on October 6, 1980. 49 U.S.L.W. 3246 (1980).

REASONS FOR GRANTING THE WRIT

I.

THE FEDERAL COMMUNICATIONS COMMISSION'S CONCLUSION DISQUALIFYING A LICENSEE FOR FILING A "STRIKE" PETITION IS CONTRARY TO THE INTENT OF CONGRESS AND THE RULINGS OF THIS COURT AND VIOLATES PETITIONERS' RIGHT TO PETITION PROTECTED BY THE BILL OF RIGHTS

This is a case of first impression which imposes severe restrictions upon the rights of licensees of broadcast stations, resulting in serious adverse consequence to the public. The Federal Communications Commission has held that Faulkner must forfeit its license (of Standard Broadcast Station WLBB, Carrollton, Georgia) because it purportedly filed a "strike" petition to deny the application of a potential competitor. In reaching this conclusion, the Commission stated:

> "the evidence clearly demonstrates Faulkner did file a strike petition. Plainly, one of Faulkner's purposes was to obstruct, impede and delay the grant of RC's application. It is unnecessary to find this was Faulkner's sole—or even primary—purpose in order . . . to put its license in jeopardy. Hence, we find Faulkner's arguments unpersuasive and we conclude its petition was not filed for legitimate public interest purposes." *Radio Carrollton*, 52 F.C.C.2d at 1180, App. 66a.

The significance attached to the alleged intent of Faulkner in filing its petition to deny is further demonstrated by the Commission's conclusion that the petition and a supplement thereto "were not filed on the basis of public interest motives, even assuming *arguendo* they had a reasonable basis in fact." *Id.* at 1179, App. 65a.

In its decisions issued subsequent to the remand, the Commission reaffirmed its early statements on delay and again stressed the increased burden it places upon licensees when filing a petition to deny, stating: "[t]he 'strike' petition policy involves a situation where a party abuses our processes by claiming to act in furtherance of general public interests when, in fact, his primary purpose is to advance anticompetitive interests that have no place in our regulatory scheme." *Radio Carrollton*, 72 F.C.C.2d at 271, App. 10a.

Faulkner submits that decisions of this Court clearly hold that, so long as a party in interest complies with constitutional, statutory and regulatory prescriptions, the filing of a petition to deny is manifestly a protected constitutional right; and the filing may not be found to be illegal or improper, assuming that the petition is not a "sham pleading," even if the primary purpose in filing is to obstruct, impede or delay the grant of an application.[5] Faulkner, as the record amply demonstrates, complied with all of the prescribed statutory and regulatory procedures.[6] The Commission made no findings to the contrary, being primarily concerned with the "delay" of the proceeding resulting from the pleadings.

Faulkner's standing as a party in interest was predicated on an allegation of economic injury as defined in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), rather than as a representative of the public interest as defined in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir.

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[5] See footnote 8, *infra.*

[6] *See* Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1) and Section 73.3584(a) of the Commission Rules and Regulations, 47 C.F.R. § 73.3584.

1966).[7] The distinction was of apparent significance to the Commission which affirmed the ALJ's conclusion that "a 'private attorney general' who is also a potential business competitor assumes a particularly difficult burden respecting truthfulness and accuracy in bringing charges against his potential adversary." *Radio Carrollton*, 52 F.C.C.2d at 1181, App. 67a. No legislative or judicial support has been cited for that conclusion. *To the contrary, Congress and the courts have concluded that only an unrestrained competitor is likely to bring to the Commission's attention allegations which the Commission has the duty to investigate.*

This Court has specifically addressed the question of a citizen's right to petition the government in decisions relating to antitrust. *E.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). It is submitted that these decisions are controlling in this case.

In *Noerr*, this Court held that no cause of action was alleged insofar as it was predicated merely upon attempts to influence the legislative branch for the passage of laws or the executive branch for their enforcement. The Court stated that:

> "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of

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[7] Representatives of the public interest are encouraged to bring to the attention of the Commission pertinent facts concerning present and prospective licensees. Indeed, the Commission issued a revised News Release (No. 54751, September 5, 1975) indicating that specific mailings were to be made *by the Commission* to certain "public interest" groups "to ensure that they are informed of Commission proceedings in which they may wish to participate."

> course, lightly impute to Congress an intent to invade these freedoms." 365 U.S. at 138.

The Court also stated that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anti-competitive purpose it may have had." *Id.* at 140.

In *Pennington, supra,* this Court held that the lower court had failed to take proper account of its holding in *Noerr* "that anticompetitive purpose did not illegalize the conduct there involved." 381 U.S. at 669. The Court went on to state:

> "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

Subsequently, it was held in *California Motor* that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." 404 U.S. at 510.

It is clear from these cases that neither the intent nor a financial or competitive interest in the outcome of the legal actions of those who are asserting their right to petition jeopardizes that right.[8] As this Court has declared:

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[8] In the *Noerr–California Motor* cases, the Supreme Court also discussed conduct which would be a sham, conduct which was completely different from Faulkner's use of its statutory and

[footnote continued]

> "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Noerr, supra* at 139.

The decision of the Commission has illegally modified this Court's ruling in *Sanders*, is contrary to the intent of Congress, and has violated the protection guaranteed to licensees by the Bill of Rights. Moreover, the Commission has sacrificed the rights of the public simply to reduce its administrative backlog and lighten its work schedule. The Commission's decision has had the effect of virtually eliminating the filing of petitions to deny by licensees against pending applications.[9]

In *Sanders, supra,* this Court held that a person who suffered economic injury might be the only one with sufficient interest to bring errors of law to the attention of the appellate court. It specifically held that Congress had intended to confer standing to such a person to proceed under the provisions of Section 402(b).[10] 309

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constitutional rights. The Commission made no finding that the petition to deny and the June 1970 Supplement were "sham pleadings." Indeed, it concluded that only one issue out of several in the petition and only one of the eight supplements were included for purposes of delay. *Radio Carrollton*, 69 F.C.C.2d at 1155 & n.30, App. 33a.

[9] The Commission's records do not reveal how many, if any, petitions to deny have been filed by licensees against applications for new stations since the date of the original decision on this case.

[10] *See* Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b) (1976).

U.S. at 477. This Court clearly contemplated that such a party could or would be motivated by an intent to delay.

Eleven years later, Congress enacted Section 309(c),[11] the so-called protest procedure, wherein it incorporated this Court's definition of a party in interest and gave existing licensees the right to delay the effectiveness of a grant of an application by requiring the Commission to set such grants aside. *See* S. Rep. No. 44, 82d Cong., 1st Sess. 8 (1951).

In 1960, Congress amended the Communications Act to eliminate the protest procedure and substituted the present provisions of Section 309(d).[12] In earlier hearings on Section 309(c) the Commission, members of the Bar, and representatives of the public testified before committees of Congress that the protest procedure had allowed existing licensees to file protests simply for the purpose of delay. The Senate report found that " 'part[ies] in interest' . . . have the power to force the holding of full evidentiary hearings and to delay the institution of new radio and television service." S. Rep. No. 1231, 84th Cong., 1st Sess. 2 (1955). There was no contention by those testifying that such a purpose was illegal or improper, but only that that statute should be changed to give the Commission a method to reduce the delay caused by such protests. In fact, the Report states that H.R. 5614 does not attempt to limit those who have standing as a "party in interest" to file protests. *Id.* at 3.

Thus Congress, as has this Court, has specifically recognized the need to allow parties with an economic

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[11]Section 309(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(c), Pub.L.No. 554, 66 Stat. 715 § 7 (1952) (amended 1960).

[12]Communications Act Amendments, 1960, Pub.L. 86-752, 74 Stat. 889 § 4(a) (1960).

interest to file pleadings with the Commission, since they often were the only ones to have sufficient interest to investigate, determine the facts and assume the expense of bringing these charges to the attention of the Commission and then appearing at a hearing if one were ordered. Therefore, it is clear that 309(d) was enacted to give the Commission the authority to dismiss charges that had no merit without a hearing in order to eliminate this delay. No question was raised by Congress about the right of such parties to file petitions even if they had an intent to delay. *See* H.R. Rep. No. 1800, 86th Cong., 2d Sess. 9-14 (1960).

The Commission has now added a new provision to Section 309(d) by providing that an existing licensee cannot utilize the rights conferred upon it by Congress if its primary purpose is to delay an application. To this end, the new strike petition policy contains five criteria, all designed to determine one purpose alone—whether the petitioner's primary purpose was to delay.[13]

The lower court expressed concern that the new policy could have a chilling effect by preventing the flow of vital information to the Commission and stated that such a result would be inconsistent with the Congressional intent and injurious to the public interest. *Faulkner*, 557 F.2d at 875, App. 52a-53a. However, on the second appeal the Court of Appeals ignored this important factor without any finding that the possibility of this serious result had been eliminated.

It is submitted that the Commission has illegally modified Section 309(d) of the Communications Act, ignored the clear and specific rulings of this Court, and

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[13] *Radio Carrollton*, 69 F.C.C.2d at 1151, App. 29a.

denied existing licensees the rights guaranteed by the Bill of Rights. The result of this action will seriously limit the Commission's ability to fulfill its statutory mandate of determining whether the public interest will be served by a grant of applications for new broadcast facilities.

II.

THE FEDERAL COMMUNICATIONS COMMISSION IN FAILING TO EMPLOY THE SAME STANDARD OF PROOF, I.E., CLEAR AND CONVINCING EVIDENCE, IN A RENEWAL PROCEEDING INVOLVING DISQUALIFYING CHARACTER ISSUES, AS IT MUST IN A REVOCATION PROCEEDING, ACTED CONTRARY TO THE INTENT OF CONGRESS AND VIOLATED BASIC PRINCIPLES OF DUE PROCESS OF LAW

In its *sua sponte* reconsideration of its decision after the remand, *Radio Carrollton*, 69 F.C.C.2d 424, App. 15a, the Commission announced for the first time that it had employed the preponderance of the evidence standard in finding Faulkner unqualified to be a Commission licensee. The Commission affirmed its use of the preponderance of the evidence standard in its subsequent *Memorandum Opinion and Order, Radio Carrollton,* 72 F.C.C.2d 264, App. 3a. The Commission erroneously concluded that to use the standard of "clear and convincing" evidence urged by Faulkner would "prevent the Commission from carrying out its statutory mandate and would in effect establish a prohibited property interest in a broadcast license." *Id.* at 270-71, App. 9a-10a. This argument was apparently accepted by the United States Court of Appeals for the District of Columbia Circuit, the *same* court which held in *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240 (D.C. Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (1980), that the "clear and convincing" standard of proof must be employed in

license revocation proceedings. Faulkner submits that the reasons given by the lower court for applying the "clear and convincing" standard in revocation proceedings apply with equal, if not greater force, to license renewal proceedings where disqualifying issues of character are raised against the licensee.

One aspect of the issue of whether an administrative agency's findings must be supported by clear and convincing evidence is currently before this court in *Steadman v. Securities and Exchange Commission*, No. 79-1266. While that case concerns SEC disciplinary proceedings involving alleged violations of the anti-fraud provisions of the securities laws, it presents the issue of whether an agency determination which has the effect of permanently excluding an individual or corporation from the business regulated by that agency must be supported by clear and convincing evidence, rather than by a mere preponderance of the evidence. This Court's disposition of *Steadman* will definitely impact on other administrative agency adjudications. Indeed, in oral argument before this Court, the General Counsel for the Securities and Exchange Commission compared the impact of *Steadman* on administrative adjudication to the impact of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), on administrative rule-making. Moreover, in oral argument in this case before the United States Court of Appeals for the District of Columbia Circuit, counsel for the Federal Communications Commission suggested that the lower court should wait until this Court issued its decision in *Steadman* before rendering a decision on Faulkner's appeal.

While there is no conflict *per se* among the courts of appeals on the specific issue presented in Faulkner's

case,[14] the conflict presented in the *Steadman* case (i.e., the Fifth Circuit's holding in *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), versus the District of Columbia Circuit's holding in *Collins Securities Corp. v. SEC*, 562 F.2d 820 (D.C. Cir. 1977)) directly affects Faulkner's case, since the Court of Appeals for the District of Columbia specifically followed *Collins* in requiring the Federal Communications Commission to employ the "clear and convincing" test in license revocation proceedings. In *Sea Island*, 627 F.2d at 244, the court held that "revocation of an FCC license is governed, at the agency level, by the 'clear and convincing' standard of proof set forth in the *Collins* decision for an SEC revocation of a broker's license."

The question presented in Faulkner's case which will remain unresolved by *Steadman* is whether the standard of proof employed in an administrative adjudication will be determined by the type of proceeding involved (i.e., a license revocation or suspension proceeding versus a license renewal proceeding) or by the issues and ultimate result to the party or parties whose rights are being adjudicated by an administrative agency. This issue is of critical importance to the broadcasting industry since, as is demonstrated below, the Federal Communications Commission can choose to raise charges involving misrepresentation and/or fraud (which, if proved, could permanently disqualify a broadcast licensee) in either a license renewal or a license revocation proceeding. In *Sea Island, supra,* the District of Columbia Circuit held that misrepresentation in a license revocation proceeding had

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[14] By statute, appeal from an order denying an application for renewal can only be made to the United States Court of Appeals for the District of Columbia Circuit. 47 U.S.C. § 402(b)(2).

to be proved by clear and convincing evidence. However, in *Faulkner*, the Court affirmed decisions of the FCC which found Faulkner guilty of misrepresentation by a mere preponderance of the evidence, with the result that the licensee was held to be *unqualified* to remain a licensee.

In *Sea Island* the court of appeals focused on the severity of the sanction proposed: license revocation and the ultimate loss of livelihood for the licensee. It was this factor which the court found determinative in *Sea Island* but ignored in Faulkner's appeal. However, when a broadcaster is found to lack the requisite character qualifications to be a Commission licensee, the end result (loss of license and loss of livelihood) is the same whether the proceeding involved is a renewal or revocation proceeding. Disqualification is the most serious sanction the FCC can impose on a licensee. It may involve more than the revocation of a single license and more than the failure to renew a single license. When a disqualifying character issue is raised against a broadcast licensee, resolution of the issue affects all the licensee's broadcast holdings and permanently impairs its ability (and the ability of its principals) to be a licensee in the future.[15] Moreover, when that disqualifying issue involves misrepresentation to the Commission, criminal charges may also be brought against the licensee. *See* 18 U.S.C. §1001 (1976).

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[15]In Faulkner's case, the Commission has held that its finding that Faulkner is unqualified to be a Commission licensee will be "*res judicata*" with respect to Faulkner's six other radio stations whose renewal applications are pending. In so doing, the Commission refused to allow Faulkner the normal evidentiary hearing on the six renewal applications. *See Faulkner Radio, Inc.*, 61 F.C.C.2d 23, 25 (1976), App. 55a, 57a.

The Communications Act of 1934, as amended, does provide separately for license renewal and license revocation proceedings. *Compare* 47 U.S.C. §307(a) (1976) *with* 47 U.S.C. §312 (1976). It also provides that the *burden of proof* is on the renewal applicant insofar as the ultimate conclusion of whether a grant will serve the public interest is concerned. *See* 47 U.S.C. §309(e) (1976). However, the Act does not address the question of what *standard of proof* is required before the FCC may make an adverse finding against a licensee on a specific charge involving misrepresentation or fraud in either a revocation or renewal proceeding. What Congress did not foresee or intend was that the Commission would apply a different standard of proof, insofar as specific charges of misrepresentation or fraud were concerned, in each type of proceeding. Since the Act allows the Commission to select the type of proceeding to be used when it considers charges which can result in the permanent disqualification of a licensee, the Commission can control the *standard of proof* to be applied and thus, in effect, control the outcome of a case.

Although a broadcast license period is generally three years, the Commission, by its own regulations, may *direct* a licensee to file its application for renewal prior to its established filing date. *See* 47 C.F.R. §73.3539(c) (1979). Furthermore, when charges are raised against a licensee during a license term, the Commission can decline to proceed by a revocation proceeding and elect, as it did in Faulkner's case, to wait until after the licensee files its renewal application to raise those issues against the licensee. In view of the Commission's ability to select the type of proceeding in which a disqualifying issue against a licensee can be litigated, no artificial distinction between license revocation and license renewal proceed-

ings should be countenanced insofar as the *standard of proof* is concerned.

In *Addington v. Texas*, 441 U.S. 418, 423 (1979), this Court noted:

> "The function of a standard of proof, as that concept is *embodied in the Due Process Clause* and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' [Citation omitted.] The standard *serves to allocate* the *risk of error* between the litigants and to *indicate the relative importance attached to the ultimate decision.*" (Emphasis added.)

The Court also described the three standards or levels of proof for different types of cases, noting:

> "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. *Since society has a minimal concern* with the outcome of such private suits, plaintiff's burden of proof is *a mere preponderance of the evidence.* The litigants thus share the risk of error in roughly equal fashion.
>
> * * * * *
>
> "The intermediate standard, which usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing' is less commonly used. . . . One typical use of the standard is in *civil cases involving allegations of fraud* or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be *more substantial than mere loss of money* and some jurisdictions accordingly reduce the risk to the defendant of *having his reputation tarnished* erroneously by increasing the plaintiff's burden of proof." *Id.* at 423-24 (emphasis added).

In determining which standard to employ in *Addington*, a civil commitment proceeding, this Court weighed the interests at stake for the individual and the state, concluding that "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* at 427.

A similar weighing of the interests must be undertaken here. As noted above, for the broadcast licensee there can be no more serious finding by the Commission than that the licensee is unqualified to remain a licensee because it lacks the requisite character qualifications. Moreover, since character issues generally involve a question of fraud or misrepresentation, there is an obvious risk of permanent damage to the licensee's reputation. In contrast, the FCC has an interest in allocating a scarce resource to those qualified to hold a broadcast license, and the Commission must have absolute trust and confidence in the representations made to it by its licensees. In balancing these interests, it must be emphasized that the risks to the individual are presented in the context of an administrative adjudication where the Commission performs the functions of investigator, prosecutor, and ultimate factfinder. Clearly, the possible injury to the individual broadcast licensee, i.e., loss of livelihood and irreparable injury to the licensee's reputation, is significantly greater than any harm to the public if, because it is required to employ a clear and convincing standard of proof in making findings of fraud or misrepresentation, an administrative agency may license a person lacking in some degree the very high standard of public stewardship expected of broadcast licensees.

In Faulkner's case the standard of proof selected was critical. The principal issues raised against Faulkner in-

volved its purpose or intent in filing a pleading with the Federal Communications Commission and whether misrepresentations had been made about that purpose or intent. The findings against Faulkner are related to the expressed or implied intent and motivation of Faulkner and its former Vice President and minority stockholder. The findings on character issues involving motive and misrepresentation, based upon a preponderance of the evidence standard, may well cause Faulkner Radio, Inc. to lose all seven of its radio station licenses. It is submitted that, if findings had been based upon a "clear and convincing evidence" standard, the renewal application of Station WLBB would have been granted. Such a result makes a mockery of the cherished principle that the American government is one of laws and not of men and would never have been permitted by Congress if it could have foreseen that this inequitable procedure would be established by administrative fiat.[16]

Clearly, this is an important matter of administrative law affecting a substantial number of American citizens which must be resolved by the judiciary in the absence of specific statutory authority. *See, e.g., Woodby v. INS,* 385 U.S. 276, 284 (1966); *Collins Securities Corp., supra,* 562 F.2d at 823.

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[16]*See* S. Rep. No. 96-1055, 96th Cong., 2d Sess. 11-13 (1980).

CONCLUSION

For the foregoing reasons, the requested petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1981

Supreme Court, U. S.
FILED
JAN 13 1981
MICHAEL RODAK, JR., CLERK

80-1169

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FAULKNER RADIO, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1980
[Filed Oct. 15 1980]

No. 79-1749

Faulkner Radio, Inc.

v.

Federal Communications Commission

Before ROBINSON, WILKEY and GINSBURG, *Circuit Judges.*

JUDGMENT

This cause came on for consideration of a petition for review of orders of the Federal Communications Commission, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court that, for the reasons summarized in the attached memorandum, the orders of the Federal Communications Commission under review herein are hereby affirmed.

PER CURIAM
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

No. 79-1749 – Faulkner Radio, Inc. v. FCC

MEMORANDUM

We are in full agreement with the disposition the Commission effected by the orders under review. We are also in substantial accord with the reasoning set forth in the Commission's decision, which elaborately underpins those orders. Accordingly, we sustain the Commission. In affirming, however, we do not intimate unqualified approval of the Commission's subsidiary conclusions of law in their entirety. It is enough that we find substantial supporting evidence and an adequate legal foundation for the Commission's outcome, and that we do.

APPENDIX B

FCC 79-379

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON D/B/A RADIO CARROLLTON Carrollton, Georgia	Docket No. 19636 File No. BP-17970
For Construction Permit	
FAULKNER RADIO, INC. (WLBB) Carrollton, Georgia	Docket No. 19637 File No. BR-1431
For Renewal of License	

MEMORANDUM OPINION AND ORDER

(Adopted: June 7, 1979; Released: June 15, 1979)

BY THE COMMISSION: COMMISSIONER FOGARTY ABSENT; COMMISSIONER JONES NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for reconsideration and a further petition for reconsideration, filed June 30 and July 28, 1978, respectively, by Faulkner Radio, Inc. (Faulkner); oppositions, filed July 12 and August 3, 1978, by the Broadcast Bureau; and a reply, filed August 16, 1978, by Faulkner. Faulkner seeks reconsideration of the denial of renewal of its broadcast license for standard broadcast station WLBB, Carrollton, Georgia, and the grant of a construction permit to Radio Carrollton (RC) for a new standard

broadcast station in Carrollton. RC has not responded to Faulkner's petitions.

I. Background

2. These proceedings arise from an application for a construction permit, filed November 29, 1967, by RC. Faulkner, the licensee of existing station WLBB, petitioned to deny RC's application, alleging lack of financial and character qualifications and defects in RC's ascertainment survey. Later, Faulkner supplemented these charges with allegations of lack of site availability, misrepresentation, and violations of Section 1.65 of the Rules.[1] The Commission consolidated RC's application with Faulkner's renewal application in response to allegations by RC that Faulkner had filed its petition for the purpose of delaying RC's application and that Faulkner had made misrepresentations to the Commission. Although the applications were not mutually exclusive, the factual disputes involved "inextricably" connected the two. 38 FCC 2d 68 (1972). The Commission affirmed an initial decision granting RC's application and denying Faulkner's. 52 FCC 2d 1173 (1975).

3. On Faulkner's appeal of the Commission's decision, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded the matter to the Commission for further proceedings. *Faulkner Radio, Inc.* v. *FCC*, 557 F.2d 866 (D.C. Cir. 1977). Addressing expressly only the denial of Faulkner's license, the Court voiced two principal concerns. The first, which the Court considered dispositive, was that the presiding judge and the Commission had possibly applied an erroneous presumption of veracity favoring the testimony of RC's principals, William and Hollis Johnson, over that of opposing witnesses solely because the Johnsons were lawyers. The Court also expressed a broader concern that the Commission's recently initiated practice of applying "strike" application criteria to evaluate petitions to deny might have a chilling effect on the submission of such petitions by competitors—those most likely to bring an applicant's deficiencies to the Commission's attention.

4. Pursuant to the Court's directive, the Commission conducted a *de novo* review of the record and once again concluded Faulkner had made misrepresentations and engaged in abuse of process, and was thus disqualified. 69 FCC 2d 1139 (1978). The Commission also clarified its definition of a "strike" petition to refer only to those petitions filed for the "primary and substantial" purpose of delaying a competitor's application. In a supplementary order, the Commission explained that the standard of proof used in disqualifying Faulkner was a "preponderance of the evidence." 69 FCC 2d 424 (1978).[2]

[1] Still later, the Review Board granted Faulkner's petition to enlarge the issues and added an undisclosed principal issue against RC. 43 FCC 2d 472 (Rev. Bd. 1978).

[2] The supplementary order was necessary because the Commission's original order

5. Faulkner petitions for reconsideration of our action on remand on three general grounds. It contends (1) the Commission did not comply with the Court of Appeals mandate, (2) the Commission used the incorrect standard of proof in denying Faulkner's application, and (3) the Commission's "strike" petition standard is vague and cannot fairly be applied retroactively to Faulkner. Faulkner does not request reconsideration on the merits of any specific finding or conclusion. The Broadcast Bureau, on the other hand, considers Faulkner's arguments "a monotonous rehash of those arguments it previously made to the Commission." Consequently, the Bureau urges that reconsideration be denied pursuant to the Commission's policy against reconsidering—absent a showing of manifest error—matters already considered and resolved. *United Television Co., Inc.*, 59 FCC 2d 663, 664 (1976). For the reasons stated below we shall deny reconsideration.

II. Scope of Remand Proceedings

6. According to Faulkner, the Commission should have discarded the existing record, ordered new hearings, drafted new findings and conclusions on all issues including those relating only to RC, and presented its results in a format free of any reference to past decision making. Faulkner argues this approach is necessary because a pervasive bias infects and distorts the existing record and decisions. Any other approach, maintains Faulkner, puts the Commission in the position of a reviewing court affirming an informed decision on the basis of an unreliable record.

7. The Commission rejects these contentions. In conducting our review, we gave careful consideration to the scope of the proceedings specified by the Court's mandate. We do not read the Court's mandate as ordering the Commission to conduct new hearings if the Commission determined new hearings were unnecessary. Nor do we read the Court's decision as reaching the merits of the Commission's ultimate findings and conclusions. Rather, the Court stated: "[t]he likelihood, though not absolute certainty, that the [administrative law] judge pursued a legally impermissible course demands at a minimum an administrative reevaluation of the evidence." 557 F.2d at 870. "We say only that by what seemingly was a class-presumption applied in this case, Faulkner Radio may have been deprived of an opportunity to have its evidence objectively considered." *Id.* at 871. " . . . [A] remand for reconsideration is necessary to assure that Faulkner Radio's evidence is evaluated without the impediment of a presumption of veracity indulged an opposing lawyer-witness solely because he happens to be a lawyer." *Id.* at 873. We therefore reviewed the

unfortunately used the phrase "substantial evidence" in a possibly misleading way. The original order also dismissed a Broadcast Bureau motion to enlarge the issues and an unauthorized pleading submitted by Talton Broadcasting Company of Lee County. Both of the Commission's Orders on remand will be further discussed in connection with the various arguments in Faulkner's petition for reconsideration.

testimony and exhibits comprising the existing record to determine whether the state of the record permitted, in light of any possible impact an improper evidentiary presumption may have had, a just result on objective reconsideration. *Cf. Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 283–4 (D.C. Cir. 1971). Our review disclosed no prejudicial errors in the admission or exclusion of evidence,[3] no distortion of the record due to the conduct of the presiding judge, and no necessity to rely on demeanor findings to assess witnesses' credibility.[4] The Commission then proceeded to evaluate the record free of any improper lawyer-veracity presumption. *Cf. Mesaroshv. United States*, 352 U.S. 1, 11–2 (1956); *Collins Securities Corp.* v. *SEC*, 562 F.2d 820, 827 (D.C. Cir. 1977). We determined that except to the extent indicated, our prior findings and conclusions are valid, notwithstanding that they appeared to reflect an erroneous evidentiary presumption.

8. We embodied the results of this examination in an appropriate memorandum opinion and order. 69 FCC 2d 1139 (1978). For reasons of stylistic economy, the Commission chose to "affirm" to some degree its prior conclusions, rather than engage in the laborious and superfluous process of drafting an entirely new decision. Our practice in this regard reflects no prejudgment on the part of the Commission but stems from the discretion granted administrative agencies in choosing how to conduct proceedings on remand. Sec. 4(i), Communications Act of 1934, as amended; *FTC* v. *J. Weingarten, Inc.*, 336 F.2d 687, 694–7 (5th Cir. 1965). Numerous transcript references of decisive significance appear throughout our opinion, which also refers to undisturbed findings and conclusions in our decision prior to remand.

9. One particular aspect of our *de novo* review deserves special attention. At Fn. 2, the Commission stated that Faulkner did not appeal the grant of RC's construction permit, but only the denial of its own renewal application. Indeed, the Commission ultimately granted RC a license to operate station WPPI, Carrollton (BL–14060). According to Faulkner, the Commission thereby revealed an unwarranted limitation in perspective in reconsidering the case on remand. We need not dispute with Faulkner whether the Commission might have disqualified RC if the Commission felt the record justified this action.

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[3] Faulkner argues that the presiding judge wrongly excluded testimony regarding the background of Faulkner's witness, Vivian McGhee, as it related to her veracity. This testimony was excluded (Tr. 757) as irrelevant because Mrs. McGhee's credibility had not been attacked. *Cf. Federal Rules of Evidence*, Rule 608(a)(2). The exclusion of that testimony for the reason stated was correct. Moreover, exclusion of the challenged testimony is inconsequential. Mrs. McGhee's subsequent testimony concerning the alleged existence of an undisclosed contract between RC and Al Cohen deserves little weight not because any question arises concerning Mrs. McGhee's veracity, but because the testimony is hearsay, which in context appears unreliable.

[4] The last of these factors is especially important and is discussed at length at Para. 12, *infra*.

As will be seen below, the Commission did not limit its review of the record in any way prejudicial to Faulkner or unduly favorable to RC. Therefore, whether the Court's mandate can be read to include remand of the grant to RC and whether Faulkner, strictly speaking, appealed the grant to RC becomes academic.

10. While the Commission feels Faulkner did not appeal the grant to RC and the Court did not call upon the Commission to review the grant, the applications of Faulkner and RC are inextricably connected by factual questions. For this reason the Commission reviewed the entire record and not merely those portions directly related to Faulkner.[5] That the Commission in its memorandum opinion and order concentrated its discussion on some points and treated others including many of those directly related to RC by reference to its prior decision does not evince neglect of the latter points as Faulkner assumes.[6] Our treatment reflects our conviction that the findings made and incorporated by reference did not depend on any erroneous presumption of veracity and were thus valid. Here again, our considerations were those of style and not prejudgment. Facts and conclusions neither discussed in the memorandum opinion and order nor incorporated by reference were not of decisional significance. Thus, the Commission did reconsider the facts concerning the grant to RC although our order on remand did not explicitly regrant RC's application. Clearly, the Commission adhered to the prior conclusions favorable to RC. Faulkner has no cause to complain that the issues were not fairly evaluated.

11. As the preceding discussion indicates, the Commission thoroughly considered and rejected Faulkner's contentions in conducting its *de novo* review. Faulkner's arguments for reconsideration are indeed little more than a summary of its brief to the Commission after

[5] On the other hand, the Commission sees no merit to Faulkner's argument, incorporated by reference in its petition for reconsideration, that further issues should have been designated. Faulkner argues that the Commission erred in failing to designate an issue against RC based on the allegations of Loyd Madden, a former client of the Johnsons, and that Faulkner was thus deprived of an opportunity to show his claim was meritorious. The Commission declined to designate an issue because Madden's charges of fraudulent conduct had been considered and apparently deemed nonmeritorious by local tribunals. 38 FCC 2d 70 (1972). Obviously, this conclusion is unaffected by the later error of law found by the Court of Appeals. There is thus no cause to reconsider it. On the subject of Loyd Madden, the Commission takes this opportunity to correct a minor error in Para. 30 of our memorandum opinion and order, 69 FCC 2d 1153. Hollis Johnson did not, as we stated, represent Madden in bankruptcy proceedings but rather in real estate and income tax matters prior to Madden's bankruptcy. The validity of a deed executed by Madden to Johnson was considered in Madden's bankruptcy proceeding.

[6] Faulkner submits that with respect to the Johnson-Thorburn telephone conversation and the Al Cohen matter the Commission conducted a one-sided reevaluation. In these instances, according to Faulkner, the Commission originally found favorably to RC, based in part on the erroneous lawyer-veracity presumption, but on reconsideration found adversely to Faulkner without revisiting the favorable findings with respect to RC. These allegations are groundless. Our discussion clearly indicates that the Commission considered all sides of these questions.

remand. Our opinion on remand makes clear that we considered Faulkner's brief and those of the other parties in arriving at a procedure we consider is fair. Contrary to Faulkner's assertions, we believe Faulkner has received both a full hearing—as required by §309(e) of the Communications Act—and a complete statement of reasons—as required by §557(c) of the Administrative Procedure Act.

12. Faulkner has not demonstrated a right to new hearings. Our examination of the record disclosed that the material questions were thoroughly explored. The only conceivable justification for ordering a new hearing would be the possible need to observe the demeanor of the witnesses to determine their credibility in instances of conflicting testimony. The Commission has determined, however, that the performance of the witnesses as reflected in the transcript and supported by extrinsic evidence of record is a reliable measure of their credibility. In our view, the credibility findings we have made would not likely be affected by observing the physical appearance of the witnesses. See *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955); *Retail, Wholesale and Department Store Union, AFL–CIO* v. *NLRB*, 466 F.2d 380, 386–7 (D.C. Cir. 1972). As there is no necessity to take new evidence on remand, neither due process nor the Administrative Procedure Act requires a new initial decision by the presiding officer at a hearing. See *Kerner* v. *Celebrezze*, 340 F.2d 736, 739–40 (2d Cir. 1965). *Cf. Van Teslaar* v. *Bender*, 365 F.Supp. 1007, 1011 (D. Md. 1973).

13. In the same vein, Faulkner fails to demonstrate the need to draft an entirely new decision or of citing transcript references in addition to those of decisive significance already cited by the Commission. A reading of the Commission's memorandum opinion and order in connection with the material incorporated by reference therein fully supports the conclusions reached by the Commission. Faulkner's petitions for reconsideration and its brief on remand are, in contrast, virtually devoid of specific references to the record or to specific findings. If Faulkner believes that the Commission failed to examine particular additional evidence which would undercut the Commission's conclusions, Faulkner bears the burden of pointing out the dispositive evidence the Commission is said to have ignored. A mere conclusory statement that the Commission ignored such evidence does not suffice. *Cosmopolitan Broadcasting Corp.* v. *FCC*, 581 F.2d 917, 927–8 (D.C. Cir. 1978). Depite this clear requirement, all that Faulkner has offered to the Commission are broad and vague generalizations and a handful of conclusory references. Furthermore, there is no merit to Faulkner's contention that the mere fact the Commission referred to past decision making when the Court ordered "new" findings shows that the Commission did not conduct a true *de novo* review. Faulkner's argument represents an unduly mechanical and formalistic view of administrative procedure rejected in *FTC* v. *J. Weingarten, Inc.*, *supra*. When the acknowledged flexibility of administrative procedure is taken into account, Faulkner's objections shrink to no more than

unsubstantiated claims of bad faith on the part of the Commission, and we therefore reject them.

III. Standard of Proof

14. Faulkner next argues that the case against it must be proved by "clear and convincing" evidence rather than a "preponderance of the evidence". Relying chiefly on *Collins Securities Corp.* v. *SEC*, *supra*, which dealt with the licensing of securities dealers, Faulkner asserts that the "clear and convincing" standard applies in cases of alleged fraud in which heavy sanctions may result. In any event, Faulkner virtually accuses the Commission of "covering up" adherence to the "substantial evidence" standard used for judicial review, even though the Commission clarified the point in its supplemental order.

15. Faulkner's reliance on the "clear and convincing" standard must be rejected as fundamentally inconsistent with the Communications Act's provisions for license renewal.[7] Faulkner in effect argues that a Commission licensee has a vested property interest in its license, which extends beyond the primary three-year licensing term, and that the government bears a heavy burden to demonstrate misconduct on the part of the licensee before depriving the licensee of this interest. Section 304 of the Communications Act, however, specifically provides that previous use of the "ether" under license creates no claim to its continued use.[8] Furthermore, on expiration of the three-year license term, no renewal may issue without a determination that the public interest, convenience, and necessity would be served thereby. §§307(d); 309(a). When the Commission for any reason is unable to make such a finding, the burden of proof with respect to any issue designated falls on the applicant, not on the Commission, except in those instances where the Commission may otherwise place the burden in its discretion. §309(e). See also, *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 61 (D.C. Cir. 1972). The standard of proof urged by Faulkner would prevent the Commission from carrying out its statutory mandate and would in effect establish a prohibited property interest in a broadcast license. This is so because under Faulkner's theory, the burden of proof would implicitly be shifted to the Commission, contrary to the statute, and renewal of license would be granted in some cases in which renewal was likely to be contrary to the public interest—albeit not "clearly and convincingly" so. Renewal under these circumstances would contravene the Commission's affirmative

[7] The Broadcast Bureau, in addition to urging that the "preponderance of the evidence" standard is the correct standard, submits that the case against Faulkner has been proved by "clear and convincing" evidence.

[8] It is important to note, however, that the issue under discussion is entirely distinct from the question of defining a licensee's "renewal expectancies" in comparative renewal proceedings. See *Central Florida Enterprises, Inc.* v. *FCC*, 44 RR 2d 345 (D.C. Cir. 1978) *modified and rehearing denied* 44 RR 2d 1567 (1979) *petition for cert. pending* 47 USLW 3623 (March 20, 1979).

duty to grant broadcast licenses only in the public interest. *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1043–4 (1972). Thus, Faulkner's references to systems of licensing unrelated to broadcasting are irrelevant.[9] Other aspects of Faulkner's standard of proof argument are again no more than unsubstantiated claims of bad faith on the part of the Commission, which the Commission categorically rejects.

IV. Strike Petition Standard

16. Faulkner's final contention is that the Commission's "strike" petition standard is overly vague and cannot fairly be applied retroactively to Faulkner. Faulkner asserts the phrase "primary and substantial" purpose to delay, used by the Commission, is ambiguous. "Primary", according to Faulkner, suggests that delay must be the controlling reason for filing the petition, while "substantial" suggests a strong, yet not predominant, reason. Moreover, Faulkner argues that it was prejudiced in preparing its defense because the standard had not yet been enunciated.

17. These arguments may readily be disposed of. The Commission's "strike" standard is not vague. Pursuant to the Court's directive, the Commission clarified its "strike" petition policy to avoid the possibility of a chilling effect on the filing of legitimate petitions to deny. We held that we would penalize only those who filed petitions with the primary purpose to delay, which means exactly what Faulkner believes it to mean.[10] To emphasize that we intended to penalize only reprehensible conduct, we defined evidentiary criteria to accompany the primary purpose standard—focusing on admissions of obstructive purpose, material misrepresentation and concealment, baseless claims, and irregular collateral conduct rather than the mere presence of economic incentive to delay.

18. Furthermore, Faulkner has not been prejudiced by retroactive application of the new standard. The "strike" petition policy involves a situation where a party abuses our processes by claiming to act in furtherance of general public interests when, in fact, his primary purpose is to advance anticompetitive interests that have no place in our regulatory scheme. Thus, while the strike petition is itself novel, the principles underlying it are not. The Commission has long penalized

[9] Recently, the United States Court of Appeals for the District of Columbia Circuit requested the Commission's views on the applicability of the "clear and convincing" standard to license revocation proceedings. In its Report to the Court, the Commission discusses factors militating against application of the "clear and convincing" standard, which also apply to renewal proceedings and further support our conclusion above. See Report in *Sea Island Broadcasting Corp. of S.C.*, 69 FCC 2d 1796 (1978).

[10] As Faulkner notes, we actually used the phrase "primary and substantial" purpose to delay. Use of the word "substantial" reflected language in the Court of Appeals mandate suggesting that the Commission might properly punish a strong secondary purpose to delay. We intended to make clear that a "strike" petition satisfied both of the standards suggested by the Court. As, however, we have adopted the more stringent test, we see no need to perpetuate the use of the word "substantial".

parties who abuse our processes through misrepresentation, anticompetitive practices, and "strike" applications. The Commission also believes that the designation order fairly apprised Faulkner of the nature of the issue designated against it.[11] Moreover, an examination of the record reveals that Faulkner's motives were explored at length. See Tr. 205–7, 215–7, 245, 260, 282–301, 334–6, 348–66, 385–6, 520–46, 1103–10; see also, *Brief [on remand] of Faulkner Radio, Inc.*, filed September 20, 1977 at paras. 42, 48. Therefore, although the formulation of the Commission's policy was to some extent in a state of flux, the record clearly discloses that Fualkner fully understood the issues raised and the evidence and arguments called for. Faulkner was thus not prejudiced in defending itself.[12]

19. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration, filed June 30, 1978 and the further petition for reconsideration, filed July 28, 1978 by Faulkner Radio, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

[11] "To determine whether Faulkner Radio, Inc., filed its petition to deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee." 38 FCC 2d at 75.

[12] Note also that Faulkner's misrepresentation and lack of candor themselves are disqualifying.

APPENDIX C

F.C.C. 78-535

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of FAULKNER RADIO, INC. On Request for Inspection of Records	FOIA Control Nos. 8-78 and 8-79

MEMORANDUM OPINION AND ORDER

(Adopted: July 27, 1978; Released: August 1, 1978)

BY THE COMMISSION:

1. The Commission has before it for consideration (a) the Office of Opinions and Review's and General Counsel's (staff) partial denial of Faulkner Radio, Inc.'s (Faulkner) two requests for inspection of records filed pursuant to the Freedom of Information Act (FOIA) (5 USC § 552), and (b) Faulkner's Application for Review of that decision. In its initial requests of June 7 and June 8, 1978, petitioner sought access to four items:

(1) Custody/inspection records for the hearing transcripts in Docket Nos. 19636 and 19637.
(2) Identification records maintained by the Office of Opinions and Review pertaining to documents in Docket Nos. 19636 and 19637.
(3) Non-deliberative portions of memoranda prepared by the Office of Opinions and Review for the Commission's consideration in Docket Nos. 19636 and 19637.
(4) Non-deliberative portions of the transcript of Hearing Item No. 3 considered at a closed meeting on May 18, 1978.

By letter dated June 21, 1978, items 1 and 2 of petitioner's request were granted to the extent that such files are maintained by the Commission. Disclosure of item 3 was denied pursuant to exemption 5 of the FOIA. Disclosure of item 4 was denied pursuant to the provisions of the Sunshine Act. Petitioner appealed the denial of access to items 3 and 4 on June 27, 1978.

2. Petitioner requests access to the above-mentioned documents in connection with the denial of Faulkner's renewal application for standard broadcast Station WLBB, Carrollton, Georgia (Docket Nos.

19636-19637). The Commission's Initial Decision [1] denying the renewal of Faulkner's license was remanded by the U.S. Court of Appeals for further proceedings. [2] The Commission reconsidered its position in a closed meeting held May 18, 1978, and we affirmed our earlier decision. [3] In support of its FOIA request, petitioner now contends that it requires the requested information in order to make a proper evaluation of the Commission's May 18th action.

3. The request in item 3 concerns access to a 34-page memorandum entitled "Reconsideration on remand from Court of Appeals of Decision denying renewal of license of Faulkner Radio, Inc. for standard broadcast Station WLBB, Carrollton, Georgia (Docket Nos. 19636-19637)." This staff memorandum was prepared by the Office of Opinions and Review and was presented to the Commission for our consideration at the closed meeting of May 18, 1978. The staff initially denied petitioner's request for this memorandum pursuant to exemption 5 of the FOIA. Exemption 5 exempts disclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 USC § 552(b)(5). After further review we believe exemption 5 was properly invoked.

4. It is well settled that exemption 5 was designed to protect the pre-decisional, deliberative processes of an agency. *NLRB* v. *Sears, Roebuck & Co.*, 421 US 132 (1975); *EPA* v. *Mink*, 410 US 73 (1973). The memorandum requested in item 3 falls squarely within the scope of exemption 5. It contains the staff's legal analysis of the issues and recommendations for final Commission action. The memorandum in no way constitutes the final decision of the Commission, and disclosure would impair the open exchange of ideas which is necessary to the decision-making process. Nevertheless, petitioner seeks to remove its request from the cover of exemption 5 by limiting the request to factual, not deliberative, material contained in the memorandum. It is conceded that the memorandum is in part a compilation of facts introduced in evidence and on the public record. However, when a summary and analysis of factual material on the public record is prepared by the staff of an agency for use in making a complex decision, the entire summary is part of the deliberative process, and is exempt from disclosure under exemption 5 of the FOIA. *Montrose Chemical Corporation of California* v. *Train*, 491 F.2d 63, 71 (D.C. Cir. 1974).

5. The request in item 4 concerns a video tape recording of the May 18 discussion in closed meeting of the *Faulkner* case. Release of closed meeting transcripts is governed by the provisions of the Sunshine Act. Subsection (f)(2) of the Act requires disclosure of "the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c)." 5 USC § 552b(f)(2). The general standard governing exemption of information from a closed meeting is that the deleted material must be exempt under subsection (c) of the Act. In the instant case, the requested video tape is exempt

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[1] *Radio Carrollton, et al.*, 52 FCC 2d 1173 (1975).
[2] *Faulkner Radio, Inc.* v. *FCC*, 557 F.2d 866 (D.C. Cir. 1977).
[3] 43 R.R. 2d 29 (1978).

under subsection (c)(10) which permits non-disclosure of discussions "by the agency of a particular case of formal agency adjudication." 5 USC § 552b(c)(10). The entire discussion concerning Faulkner Radio on May 18 pertained to the disposition of an agency adjudication. Any discussion of factual material is inextricably bound to the deliberative process, inasmuch as the facts are presented only in an analytical fashion. Furthermore, the legislative history of the Sunshine Act indicates that an agency's duty to edit a closed meeting transcript is a limited one. The *Senate Report* states:

> Agencies need not edit a transcript or electronic recording of the Commission's discussion of a particular matter word by word so as to make abbreviated portions of the record of the meeting available to the public. Where sensitive matters are an integral part of the record of the discussion of a matter, no part of the record need be made public. *S. Rept.* No. 94-354, 94th Cong., 1st Sess. (1975)

The video tape has been reviewed and no readily segregable segments of discussion exist.

6. Accordingly, IT IS ORDERED, That the Application for Review filed by Faulkner Radio, Inc. IS DENIED. Petitioner is advised that it may seek judicial review of this decision pursuant to 5 USC § 552(a)(4)(B).

The officials responsible for the denial of petitioner's request are the following Commissioners: Chairman, Charles D. Ferris; Robert E. Lee, James H. Quello, Abbott M. Washburn, Joseph B. Fogarty, Margita E. White, and Tyrone Brown.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX E

FCC 78-444

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, D/B/A RADIO CARROLLTON CARROLLTON, GEORGIA For Construction Permit	Docket No. 19636 File No. BP-17970
Faulkner Radio, Inc. (WLBB) Carrollton, Georgia For Renewal of License	Docket No. 19637 File No. BR-1431

MEMORANDUM OPINION AND ORDER

(Adopted: June 28, 1978; Released: June 28, 1978)

BY THE COMMISSION: COMMISSIONER QUELLO NOT PARTICIPATING.

1. On May 18, 1978, we considered, for the second time, Faulkner Radio, Inc.'s application for renewal of its license for station WLBB, Carrollton, Georgia. *Faulkner Radio, Inc.*, FCC 78-357 (adopted May 18, 1978; released May 31, 1978). Our first order denying renewal of the WLBB license was vacated and remanded by the United States Court of Appeals for the District of Columbia Circuit. *Faulkner Radio, Inc.* v. *FCC*, - U.S. App. D.C.-, 557 F.2d 866 (1977). On remand, we conducted a careful *de novo* review of the evidence and once again concluded that renewal of the WLBB license would not serve the public interest, convenience and necessity. We found Faulkner had committed knowing and willful misrepresentations and had filed petitions to deny

for the primary purpose of delaying the grant of another party's application.

2. We now grant *sua sponte* reconsideration of the May 18 *Order* for the purpose of clarifying one point. Several times during the course of the opinion the word "substantial" was used to describe the quality and amount of record evidence which led us to deny WLBB's license. We now realize that our use of the word "substantial" could cause our appraisal of the record evidence in this case to be misinterpreted.[1] While regretting any possible misunderstanding caused by our use of this word, we wish to make clear that in using the inclusive term "substantial" we meant there was reliable and probative evidence in the record which clearly satisfied the customary preponderance of the evidence standard used in administrative proceedings.[2] *See* 5 U.S.C. §556(d); *Charles Leo Suggs*, 57 FCC 2d 1157, 1158 (Rev. Bd. 1976). Moreover, we did not review the ALJ's decision in this case under the "substantial evidence" standard used by courts when they review agency decisions. 5 U.S.C. §706(2)(E).[3] The denial was based on our own independent review of the record which led us to conclude that the preponderance of the evidence supported the findings and conclusions against WLBB.

3. ACCORDINGLY, IT IS ORDERED, that, on our own motion, reconsideration IS GRANTED in this case to the extent noted herein.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

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[1] *See, e.g.*, letter to Clerk, United States Court of Appeals for the District of Columbia Circuit from Counsel for Sea Island Broadcasting Corp. of South Carolina (re: *Sea Island Broadcasting Corp. of South Carolina* v. *FCC*, No. 76-1735) dated June 1, 1978 which relied on our *Faulkner* decision.

[2] *See Collins Security Corp.* v. *SEC*, – U.S. App. D.C.–, 562 F.2d 820, 823 (1977).

[3] Our reference to this standard in footnote 23 of the opinion merely suggested that on appeal a reviewing court could sustain our judgment even though there was conflicting evidence.

APPENDIX D

FCC 78-357

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, D/B/A/ RADIO CARROLLTON, CARROLLTON, GA.	Docket No. 19636 File No. BP-17970
For Construction Permit	
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA.	Docket No. 19637 File No. BR-1431
For Renewal of License	

MEMORANDUM OPINION AND ORDER

(Adopted: May 18, 1978; Released: May 31, 1978)

BY THE COMMISSION: COMMISSIONER LEE ABSENT.

1. On April 30, 1975, we adopted a Decision (52 FCC 2d 1173) in the above-captioned matter. That Decision affirmed the Initial Decision (52 FCC 2d 1187 (1974)) of Administrative Law Judge David I. Kraushaar; granted the application of Radio Carrollton (hereinafter RC)[1] for a construction permit (BP-17970) for a standard broadcast at Carrollton, Georgia; denied the application of Faulkner Radio, Inc. (hereinafter Faulkner) for renewal (BR-1431) of the license to operate WLBB, Carrollton; and ordered Faulkner to terminate operation of WLBB. We premised our Order on a determination that a petition to deny filed by Faulkner on June 18, 1968 was, in fact, a "strike" petition intended to delay the grant of RC's application, and further, that Faulkner had engaged in willful misrepresentations and lacked candor during the course of the proceeding.

2. On May 26, 1977, the United States Court of Appeals for the District of Columbia Circuit vacated our Order denying renewal of the WLBB license and remanded the matter to the Commission for further proceedings.[2] *Faulkner Radio, Inc.* v. *FCC*, 557 F.2d 866 (C.A.D.C., 1977), 40 RR 2d 1129. In so doing, the Court expressed two principal concerns. The first one it considered dispositive of Faulkner's appeal,

[1] Radio Carrollton is a partnership consisting of Hollis B. Johnson and William Johnson. Although unrelated, the Johnsons were law partners in practice at Carrollton at the time the application was filed.

[2] Faulkner did not appeal the grant of RC's construction permit application. The permit was granted April 30, 1975. RC's application for a license (BL-14060) for WPPI, Carrollton, was granted April 6, 1976, and later assigned to Radio Carrollton, Inc., on June 30, 1976 (BAL-8706).

and the other expressed a broader concern relating to the criteria used by the Commission in evaluating "strike" petitions to deny. Finding that both Judge Kraushaar and the Commission had possibly applied an erroneous presumption of veracity favoring the testimony of RC's principals, William and Hollis Johnson, the Court ruled remand was necessary " . . . to assure that Faulkner Radio's evidence is evaluated without the impediment of a presumption of veracity indulged an opposing lawyer-witness solely because he happens to be a lawyer."[3] With respect to the Commission's recently-initiated practice of using "strike" application criteria to evaluate petitions to deny filed by potential competitors, the Court declared that unless the criteria were clarified, the practice " . . . might well have a chilling effect on the submission of petitions to deny by competitors — those most likely to bring an applicant's deficiencies to the Commission's attention."[4]

3. On remand, the Commission directed the parties to file comments respecting their proposed disposition of the proceeding. (Order, FCC 77-506, released July 22, 1977). Now before us are (a) the Brief of Faulkner Radio, Inc., filed September 20, 1977; (b) Comments of Radio Carrollton, filed September 20, 1977; (c) the Broadcast Bureau's Comments Regarding Proposed Disposition of Docket No. 19637 on Remand, filed September 20, 1977; (d) Comments of Talton Broadcasting Company of Lee County, filed September 13, 1977, and (e) the Broadcast Bureau's Motion to Strike (d). Also before us for disposition are (f) the Broadcast Bureau's Petition to Reopen the Record and Enlarge the Issues, filed October 13, 1977; (g) the Broadcast Bureau's Supplement to (f), filed October 26, 1977; (h) the Broadcast Bureau's Further Supplement to (f), filed October 27, 1977; (i) the Opposition of Faulkner Radio, Inc. to (f), filed November 21, 1977;[5] (j) Reply to (i), filed November 30, 1977, by the Broadcast Bureau; (k) a Motion for Leave to File Affidavit, and Further Comments, filed December 9, 1977, by Faulkner Radio, Inc.; and (l) the Broadcast Bureau's Opposition to Motion for Leave to File Affidavit, filed December 13, 1977.

4. As might be expected, the parties propose conflicting methods for satisfying the Court's directive. RC argues there is no need for a further hearing and "[a] decision can be made on the present record because there is sufficient evidence in the record to support the Commission's findings and conclusions regarding Faulkner's conduct *without* using the Johnsons' testimony." (RC's Comments, p. 2, emphasis supplied). The Broadcast Bureau, arguing that " . . . the issue upon which this case has been remanded by the Court of Appeals is very narrow in scope . . . ," urges the Commission to exercise its

[3] 557 F.2d 873, [SLIP Op. at p. 16].

[4] 557 F.2d 875, [SLIP Op. at p. 20].

[5] Faulkner was granted an extension of time to November 21, 1977 in which to respond to the Bureau's motion. FCC 77M-1811, released October 21, 1977.

broad discretion by reevaluating the existing record evidence, "shorn of the erroneous preference now overshadowing it." (Broadcast Bureau Comments, p. 9). Addressing the question of whether the Commission should further clarify its policy with regard to "strike" pleadings, the Bureau argues that there is sufficient extrinsic independent evidence to deny Faulkner's application without resort to the Commission's challenged "strike" policy. The Bureau nevertheless recommends that the Commission clarify its policy on "strike" petitions in its disposition on remand rather than in the context of a formal and time-consuming rule making proceeding.[6]

5. On the other hand, Faulkner argues that "[t]he Court's finding of prejudicial bias by the Administrative Law Judge, which the Commission's decision incorporated, places again before the Commission the resolution of all issues, the resolution of which are dependent upon the credibility of the witnesses." (Faulkner's Comments, p. 8)[7] Faulkner argues the Commission's Decision of April 30, 1975 must be " . . . totally disregarded and the issues decided upon a record fairly taken and fairly considered." *(Id.* at p. 9). It further argues that Section 309(e) of the Communications Act (47 U.S.C. 309(e)) entitles it to a full hearing and a new decision. Finally, Faulkner claims the Commission is "effectively preclude[d] from . . . retroactively applying any standard it may choose to adopt [on strike petitions] to the motivations underlying Faulkner's filing of the petition to deny . . . " (*Id.* at p. 8).

6. When we first considered this matter, we concluded that a denial of Faulkner's renewal application was justified because Faulkner had filed a strike petition and had engaged in willful misrepresentations and lacked candor during the course of the proceeding. As we noted in Para. 16 of our Decision, we considered the misrepresentations and lack of candor the "more dispositive" ground for denying renewal. Under the specified issues, the Presiding Judge found—and we agreed with those findings—that Faulkner lacked candor and committed knowing and willful misrepresentations both through the hearing testimony of Robert M. Thorburn (a broadcaster of some 14 years and Vice-President and General Manager of Faulkner's Carrollton stations) and by Thorburn's submission of written documents to the Commission. (Decision, Para. 5). Since misrepresentations are alone sufficient to warrant a denial of license renewal, we will first review the misrepresentation and lack of candor

[6] The Bureau devotes a considerable portion of its comments to suggesting a basis for shaping criteria to be applied to potential "strike" petitions. Among those proposals, it suggests use of the *Grenco* criteria *(infra)* and urges that the principal consideration should be whether the petition to deny was filed in good faith.

[7] Faulkner claims that only the ascertainment and financial issues may be considered as resolved.

issues in order to evaluate the evidence free of the erroneous lawyer-veracity presumption which led the Court to remand this proceeding.

7. Initially, we reject Faulkner's argument that the Initial Decision and the Decision herein must be disregarded and completely new hearings held for this reevaluation. In our judgment, the more appropriate approach is to reevaluate the existing record, "shorn" of any taint from the erroneous presumption that an attorney's testimony is entitled to superior weight. See *United Television Co., Inc. (WFAN-TV)*, 59 FCC 2d 663, at 665 (1976). In this connection, we note that Faulkner's claim that completely new hearings are needed was rejected by the Court itself, which ruled instead that in order to assure that Faulkner has not " . . . been deprived of an opportunity to have its evidence objectively considered" a remand was needed to evaluate Faulkner's evidence " . . . without the impediment of a presumption of veracity indulged an opposing lawyer-witness solely because he happens to be a lawyer." *Faulkner Radio, Inc.* v. *FCC*, 557 F.2d at 870 and 873, respectively.

8. We believe an objective reexamination of the existing record will fully carry out the Court's directive. Faulkner's claim that a hew hearing is needed because of the Presiding Officer's alleged bias must be rejected. An identical argument, supported by the same transcript excerpts which Faulkner cites in its present brief, was made to the Court. Although the Court noted this claim of alleged outwardly manifested bias, it ruled that the basis for remand was the possible application of the erroneous lawyer-veracity presumption and not the claim of general bias on the Presiding Officer's part. Finally, in rejecting Faulkner's argument that new hearings are required, we think it significant Faulkner does not claim with any specificity that it was denied an opportunity to present additional evidence or that it had offered evidence which was wrongly excluded. We also deem it significant that the Court did not reverse because error was committed in creating the record. Rather, it remanded because the evidence may have been erroneously evaluated.

9. In order to carry out the Court's directive that we reevaluate the evidence—and particularly Faulkner's evidence—to assure it is "objectively considered", we will reexamine the record, devoting particular care to the matters on which the parties and the Commission earlier focused. Faulkner's position respecting these matters (its claim that new hearings are needed) has already been noted. On the other hand, RC and the Bureau argue that completely apart from any consideration of Faulkner's motives in filing the petition to deny, the record contains sufficient substantial and untainted evidence to sustain denial of Faulkner's renewal application on the basis of misrepresentations and other improper conduct.

10. *The June 20, 1968 Hollis Johnson-Robert Thorburn conversation.* Immediately after Faulkner filed its petition to deny RC's application, Robert Thorburn telephoned Hollis Johnson (one of RC's

partners) to discuss RC's application and Faulkner's petition to deny. The existence of the conversation is beyond dispute. However, the affidavits of Johnson (contained in RC's opposition to the petition) and Thorburn (contained in Faulkner's reply to RC's opposition) concerning the conversation were found by the Commission to be directly conflicting in most material respects and an issue was designated to determine which of the parties made misrepresentations to the Commission in submitting the affidavits (Issue 6).[8]

11. Upon review of the record, we reaffirm our conclusion in Para. 17 of our Decision that Issue 6 should be resolved against Faulkner.[9] In so doing, we reject any presumption that Hollis Johnson's testimony is to be preferred simply because he is an attorney. Rather, we are convinced by our reexamination of the record that Hollis Johnson's testimony concerning both the conversation with Thorburn and his preparation of the affidavit describing the conversation is the more believable and accurate, not pervaded by the evasive inconsistencies and material contradictions central to Thorburn's testimony. Johnson's preparation of the affidavit soon after the June 20th conversation (his affidavit is dated June 26, 1968) lends credibility to the affidavit because of its relative contemporaneousness.[10] Thorburn's affidavit, executed August 9, 1968 in response to RC's opposition to Faulkner's petition to deny, is rendered less persuasive because of the lapse of time between the June 20th conversation and his affidavit. Further the affidavit and testimony of Linda (Vaughn) Coffelt, Hollis Johnson's secretary, although of limited value because she heard only Johnson's side of the conversation, tends to corroborate both Johnson's affidavit and his testimony concerning the statements attributed to Thorburn. Finally, the documentary evidence of Faulkner's financial status at the time of the conversation when considered in conjunction with the rest of the record (although admittedly inconclusive when standing alone)

[8] The affidavits of Johnson and Thorburn are set out in Paras. 10 and 11 of the Initial Decision, respectively.

[9] In Para. 17 of our Decision we indicated that absent an abuse of discretion, we would not substitute our judgment on the credibility of witnesses for that expressed by the Presiding Officer. We further noted that the Judge, in resolving Issue 6 against Faulkner, had based his determination, in part, on "his observation of the witnesses' demeanor." We wish to make it clear that our reevaluation of the record evidence in response to the Court's remand has been *de novo*. Moreover, we believe the reasons we outline below, in support of conclusions adverse to Faulkner with respect to Thorburn's August 9, 1968 affidavit and his testimony at the hearing concerning Issue 6, are sufficient to justify these adverse conclusions, without regard to the Judge's demeanor findings. Thus, under the circumstances of this case, the Judge's observation concerning demeanor will be treated as surplusage. See *Carbon Emery Broadcasting Co.*, 22 FCC 584, 586 (1957).

[10] Johnson's affidavit was prepared from notes which he took during the June 20th conversation. However, those notes were subsequently either lost or destroyed when Johnson moved his offices. While Johnson could produce no witness to corroborate his testimony that he took such notes, we are satisfied Johnson's testimony respecting the taking of the notes and their subsequent loss was not shaken on cross-examination.

tends to support Johnson's version of the statements purportedly made by Thorburn respecting Faulkner's need for delay.[11] On the other hand, a comparison of Thorburn's August 9, 1968 affidavit with his vacillating testimony at hearing raises serious questions both as to the believability of his testimony and to the truthfulness and accuracy of the affidavit itself.[12] Thorburn's further effort to explain why he discussed Faulkner's financial situation during the conversation — and more specifically why he mentioned Faulkner's need to refinance WLBB's financial obligations — raises further doubt on the same count.[13] Accordingly, we reaffirm our conclusion that Thorburn's affidavit concerning the June 20, 1968 conversation with Hollis Johnson was submitted to the Commission with a "cavalier disregard" for the truthfulness and accuracy of its content and as such constituted a misrepresentation of facts. (See *3J's Broadcasting Co.*, 41 FCC 2d 664, 667 (1973)). We also conclude that Thorburn's testimony on this matter before the Commission evinces an unmistakeable lack of candor bordering on deception, conduct the Commission cannot and will not tolerate. (See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946)).

12. *The O.S. Whitman affidavit.* In 1967, O.S. Whitman, a farmer and automotive glass installer living in Carrollton, granted RC a one-year written purchase option[14] on four acres of land which RC specified in its November 27, 1967 application as the proposed antenna

[11] Faulkner Exhibits Nos. 4–7 and 10 consisting variously of pertinent FCC Form 324 Licensee Financial Statements, corporate financial statements, the financial portions of applications for licenses for two stations Faulkner had acquired, and a record of outstanding promissory obligations at a Carrollton bank were offered and received. (Tr. 224–245).

[12] In his affidavit, Thorburn indicated "since Hollis Johnson called me at the time he filed his application, I thought that, as a matter of courtesy, I would call him . . . ". During the hearing, however, Thorburn testified that he reviewed RC's application at the invitation of Hollis Johnson at Johnson's office in June or July of 1968 (Tr. 200). Realizing the Petition to Deny was filed on June 18, 1968, Thorburn revised his testimony to indicate he reviewed the RC application at Johnson's office in December of 1967 or January of 1968 (Tr. 202). Thorburn later revised his testimony to say he requested a copy of the RC application from his attorney four to six weeks after the publication notice (December 6, 1967) and until that time, he had not seen the RC application. Later, Thorburn indicated it was he, not Hollis Johnson, who initiated the phone call in order to see the RC application (Tr. 335). Johnson denies having any conversation with Thorburn concerning the RC application until June 20, 1968.

[13] Thorburn's affidavit stated "I told Hollis Johnson it had been necessary to refinance WLBB's note at the bank for purposes of a down payment on another station." Upon questioning by the Law Judge, however, Thorburn could offer no explanation for any of the statements he made concerning Faulkner's financial status, answering only "I don't recall why I did that . . . " (Tr. 348), "I don't really have a reason for volunteering the information . . . " (Tr. 349), and "It just happened. I was talking when I should not have been talking," (Tr. 349–350).

[14] RC was also accorded the right to extend the option for an additional six months.

[15] There is record evidence indicating that on at least two occasions after the formal option expired, Whitman indicated to the Johnsons that the land was still available.

and transmitter site. In the Spring of 1970, after RC's formal option had expired[15] Whitman began to consider the possibility his daughter might wish to live on this optioned land. Thorburn, learning of the site location from RC's application, contacted Whitman and after some discussion with him obtained Whitman's unsworn statement, which was later submitted to the Commission in affidavit form as a part of Faulkner's June 23, 1970 supplement to the petition to deny. Whitman's purported affidavit (which was drafted by Thorburn) stated that RC's option had expired, that Whitman had no present intention of selling the land to RC, and that the information contained in the affidavit had been communicated to RC. The Commission subsequently designated issues against RC to determine whether RC had misrepresented the availability of the Whitman site (Issue 4) and whether RC had failed to keep its application current. (Issue 3).

13. Our reexamination of the record clearly establishes the following: that Thorburn (on Faulkner's behalf) misrepresented to Whitman without a basis in fact that the Johnsons intended to go to court over the availability of the antenna site (Tr. 482) — the most likely effect being to create enmity between the Johnsons and Whitman; that Thorburn misled the Commission by suggesting Whitman was represented by counsel when he was not (Tr. 262, 338–343 *passim*); that Thorburn willfully and knowingly misrepresented to the Commission that the O.S. Whitman statement was in fact a duly-executed affidavit conforming with the requirements of Section 1.580(j) of the Commission's Rules; that the purported affidavit on which the Commission relied intentionally withheld information necessary to the Commission's deliberations (namely, that at the time the affidavit was drafted, the land was not unavailable to RC but rather, in a "check back" status (Tr. 266–267); and finally, that Thorburn's testimony concerning his participation in the Whitman

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The Johnsons testified they first learned the land was unavailable from the Whitman "affidavit."

matter is not believable and is riddled by a lack of candor and an absence of truthfulness.[16] Thus, except as discussed below,[17] we conclude that the findings and conclusions of the Initial Decision which we adopted (Paras. 54–72, 117–122), and the conclusions set forth in the Decision (Paras. 8–9)[18] are supported by substantial record evidence and are hereby affirmed. Mindful of the Court's concern regarding the possible application of the veracity presumption and its adverse effect on Faulkner's evidence,[19] we have proceeded with utmost caution in reviewing the evidence on this matter. Following that review we are satisfied there is no instance in which the testimony of RC's principals, the Johnsons, is to be preferred over that of Faulkner's witnesses because the Johnsons are lawyers.[20]

14. *The Al Cohen ("Hidden Ownership") issue.* Under this issue, added by the Review Board, further hearings were held to determine

[16] For instance, in testifying about the O.S. Whitman "affidavit", Thorburn stated he was "just realizing" the consequence of filing improperly executed affidavits. Thorburn is a Notary Public and a broadcaster of 14 years who had previously submitted affidavits to the Commission and who had in fact submitted supportive affidavits along with a petition to deny in the Slidell, Louisiana broadcast proceeding. It is to be noted that the issues raised by Faulkner there are similar to those raised by Faulkner in this proceeding. Of further note is the fact Faulkner Radio (for whom Thorburn was working at that time also) forfeited $3,000.00 to the Commission for the execution of false affidavits in connection with a "fraudulent billing" complaint lodged against Faulkner's station (WBTR-FM) in Carrollton. Memorandum Opinion and Order, FCC 69–681, released June 23, 1969. We are also compelled to note by way of additional example Thorburn's testimony as to the number of meetings he had with Whitman. A review of the record (variously at 256–260, 261, 262–263, 264, 272, 273–275, 336–342, 344–345, 377) will reveal the patent inconsistencies and contradictions in his testimony, and accordingly, the insubstantial weight his testimony is entitled to.

[17] We think the findings at Para. 63 of the Initial Decision concerning the Whitman "affidavit" should be revised to reflect that the statement of O.S. Whitman included by Faulkner in the June 23, 1970 supplement to the petition to deny was an "improperly-executed" affidavit. Similarly, the reference in Para. 9 of our Decision to "the false Whitman affidavit" is revised to read "the improperly-executed Whitman affidavit." Finally, the reference in Para. 18 to "the false affidavit" is revised to read "the improperly-executed affidavit."

[18] In Para. 18 of our Decision we indicated that we would not disturb the Judges' credibility findings "absent some indication of abuse of discretion." We again wish to make it clear, however, that our present reevaluation of the record, following the Court's remand, is *de novo* in nature. See footnote 9, *supra* at p. 6.

[19] Of course, to the extent that this issue involves documents submitted to the Commission by Faulkner, the accuracy or truthfulness of such documents does not involve the veracity of the Johnsons' testimony. This same observation applies to consideration of the Holey-Thorburn correspondence (Para. 16, *infra*), he appraisal of which does not depend on any testimony of the Johnsons.

[20] We recognize that the issue respecting the Whitman matter called for no adverse conclusions against Faulkner and that consideration of the Holey-Thorburn correspondence (Para. 16, *infra*) was not the subject of a separate lack of candor issue. However, no specific misrepresentation or lack of candor issues are needed to consider these matters, since the Commission always has authority to deny a license or application where the record reveals such misconduct. See *Grenco, Inc.*, 39 FCC 2d 732 (1973) and *BHA Enterprises, Inc.*, FCC 78–168, released March 9, 1978.

whether Al Cohen had a one-third ownership interest in Radio Carrollton, whether the Johnsons lacked candor with the Commission respecting this matter, and if so, the effect on RC's qualifications to become a Commission licensee. After extensive consideration of both the undisputed facts and the conflicting testimony respecting this matter, the Judge concluded Cohen had no such ownership interest and resolved this issue favorably to RC. (Initial Decision, Paras. 78–108). In our Decision, we considered the Al Cohen matter as one factor to be weighed under the abuse of process issue (Decision, Para. 10) and as a matter relevant to the misrepresentation and lack of candor issues (Decision, Paras. 16 and 19).

15. Upon further consideration, we do not believe the Al Cohen matter should be made the basis for any adverse conclusions against Faulkner. To begin with, the designated issue did not call for any adverse conclusions against Faulkner. While we agree with the Judge that the resolution of this issue in RC's favor was correct, the Al Cohen matter was not considered a decisive factor under either the abuse of process issue or the misrepresentation and lack of candor issues. In both instances, it was only one factor, and a distinctly minor one at that, to be evaluated. In view of this, the Decision is modified to reflect the fact that no conclusions adverse to Faulkner are made under this issue.

16. *The Thorburn-Holey correspondence.* Finally, while not the subject of a separate issue in this proceeding, we believe still further evidence of lack of candor on the part of Faulkner's witnesses is demonstrated by the Thorburn-Holey correspondence. On May 20, 1968, the day after RC's application was put on the Commission's "cut-off" list for processing,[21] Thorburn sent a letter to Faulkner's consulting radio engineer, W. J. Holey, requesting Holey "to find another location where 1330 kc [the frequency RC proposed to use at Carrollton] will fit as well as the frequency of 1500 kc [another frequency available for use in the Carrollton area] . . . " On May 27, 1968, Holey replied that "the 1330 kc application for Carrollton was put on the cut-off list May 19th and will be free and clear June 19th so I do not see that anything can stop it, or slow it down, now . . . " Like the June 20, 1968 Thorburn-Johnson conversation discussed above, the Thorburn-Holey correspondence is principally relevant to the abuse of process issue specified against Faulkner.[22] However, the testimony concerning this matter is also clearly relevant to the serious question of Faulkner's conduct before the Commission during hearing. It is unnecessary to restate the findings of fact concerning this matter. (See Paras. 23–28 of the Initial Decision). But we continue to believe they

[21] The Commission's cut-off procedures for new standard broadcast stations are set forth at Section 1.571 et seq. of the Commission's Rules.

[22] In this same connection, so is the Loyd Madden affair, discussed *infra* in Paras. 30 to 31.

are supported by substantial evidence, and they are hereby affirmed. Upon reevaluation of the record concerning this particular incident, it is our judgment the testimony of Faulkner's witnesses, Thorburn and Holey, is so rife with contradictions, equivocations and inconsistencies, and is so seemingly lacking in candor or appreciation for truthfulness and accuracy as to raise additional doubts concerning Faulkner's qualification to remain a Commission licensee.

17. In our judgment, completely apart from any motives Faulkner may have had to delay the grant of RC's application, there is substantial evidence in the record (considered free of any lawyer-veracity presumption) to support the conclusion that Faulkner "also displayed lack of candor and committed knowing and willful misrepresentation by both the testimony of Thorburn . . . and by his seeking to deceive the Commission in the submission." of some of his affidavits. (Decision, Para. 23). Through this conduct, Faulkner has demonstrated that it does not possess the qualifications to be a licensee. Accordingly, we conclude that the public interest would not be served by a renewal of Faulkner's license.[23]

18. Apart from the misrepresentation, we must also consider the Court's directive that we clarify our strike petition policy. The Court pointed out that in our Decision, the Commission concluded, that "one of Faulkner's purposes was to obstruct, impede and delay the grant of RC's application" and that it was "unnecessary to find this was Faulkner's sole—or even primary—purpose in order to put its license in jeopardy." The Court then went on to note its

> concern . . . [that] this refinement . . . leaves open the possibility that a licensee jeopardizes its license when it tenders a petition to deny for bona fide public-interest reasons but it also has an incidental—perhaps even a distinctively minor—purpose to retard progress on another's application. Such a policy might well have a chilling effect on the submission of petitions to deny by competitors—those most likely to bring an applicant's deficiencies to the Commission's attention. *Faulkner Radio, Inc.* v. *FCC*, 557 F.2d 866, at 875 (1977).

19. As the Court further noted, the Commission has recognized the possibility that our strike petition policy might have the chilling effect referred to above (see *State College Communications Corp.*, 58 FCC 2d 462, at 466 (1976)), but the Court was not persuaded such a chill was avoidable if the Commission proposed to penalize licensees on the basis of analyzing their subsidiary motives. (557 F.2d at 875).

20. While we can understand the Court's concern, we believe our strike petition policy can be fully reconciled with a licensee's right to petition to deny a potential competitor's application without imposing any undue chill on that right. In our judgment, this reconciliation

[23] In reaching this conclusion, we recognize that much of the supporting evidence is in sharp conflict, particularly the crucial Hollis Johnson-Thorburn conversation. But "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, at 620 (1966).

requires a balancing of two competing Congressional purposes. We begin with the fundamental proposition that the field of broadcasting is one of free competition, that such field is open to anyone who can demonstrate his qualifications (subject only to frequency availability), and that Congress intended to leave competition in the broadcasting field where it found it. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, at 474–5, *passim* (1940). Against this paramount public interest in free competition in broadcasting must be weighed the Congressional purpose in affording an existing licensee the right under Section 309(d) of the Communications Act, 47 U.S.C. Sec. 309(d), to file a petition to deny against the application of a competitor or potential competitor.

21. Under this licensing scheme, one seeking entry into the broadcasting field is free to file his application with the Commission. But every applicant is on notice that consideration of his application might be delayed by the filing of a petition to deny which either questions the adequacy of the application on its face or brings to the Commission's attention extra-application information bearing on the applicant's qualifications. As the Court itself noted, such petitions to deny are often filed by competitors (*Faulkner Radio, Inc.* v. *FCC*, *supra*, Fn. 66). And unavoidably, the progress of considering a contested application is retarded — in greater or lesser degree — depending on whether a petition to deny is denied without hearing, or whether a hearing is needed to resolve substantial and material questions of fact raised by the petition to deny. Moreover, an existing licensee who challenges proposed new competition may well obtain an incidental benefit by delaying such competition while his petition to deny is being considered. But even though the challenged applicant is undoubtedly put to extra time and expense in defending his application, such burdens are an inseparable part of the statutory scheme under which the applicant seeks his authorization.

22. Our discussion has thus far assumed that a licensee's petition to deny a competitor's application has been filed in good faith. But when it appears that such a petition has been filed in bad faith, we are required to resolve "the perennially difficult problem of the relationship of an existing licensee to proceedings which delay or impede application for competitive new authority." *Pressley* v. *FCC*, 141 U.S.App.D.C. 283, at 284, 437 F.2d 716 at 717 (1970). In the present context, the crucial question is whether inquiry into the petitioner's motives in challenging his potential competitor's application is legally compatible with the Congressional purpose behind the pre-grant protest procedure authorized by Section 309(d) of the Communications Act. Essentially, the strike petition policy — and the strike application policy on which it is based — rest on the premise that a person who uses improper means to impede action on an application for competi-

tive new service opens itself to the charge of abusing the Commission's processes.[24] An agency is not powerless to prevent an abuse of its processes. And in considering challenges to pending applications, "the Commission need [not] allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests." *United Church of Christ* v. *FCC*, 359 F.2d 994, at 1005 (1966). See also *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514 (3d Cir. 1948), *cert. denied*, 335 U.S. 912 (1949); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 247 (1944). Cf. *WKAT, Inc.* v. *FCC*, 111 U.S.App.D.C. 253, 296 F.2d 375, *cert. denied, sub nom., Public Service Television, Inc.* v. *FCC*, 368 U.S. 841 (1961).

23. We come now to the clarification of the strike petition policy called for by the Court. In Para. 11 of our earlier Decision, we noted that we had adopted criteria in *Grenco, Inc.*, 28 FCC 2d 166, 167 (1971) for determining an applicant's strike application motives. Under these guidelines, the significant factors to be considered are: (a) the timing of the application, (b) economic and competitive benefits occurring from the application, (c) the good faith of the applicant, and (d) questions concerning a frequency study. These criteria will continue to govern competing applications, where questions of "strike" motives arise.

24. However, to avoid any possibility of imposing an undue chill on the filing of petitions to deny, we believe that more stringent standards should apply under the strike petition policy, *i.e.*, in the situation where a licensee petitions to deny the application of a competitor or potential competitor. In the case of strike petitions, we think the crucial consideration is whether the petition to deny was filed for the primary and substantial purpose of delay. As we pointed out in *State College Communications Corporation*, 58 FCC 2d 466:

> . . . we will not hesitate to take appropriate and necessary action where information comes to our attention which indicates that a licensee may have filed in bad faith — *i.e.*, to block, impede or delay the grant of another application.

25. In considering whether a strike petition issue is warranted, we will not infer the existence of primary purpose to delay from the mere filing of a petition to deny, because a licensee who establishes "standing" has a statutory right to bring to the Commission's attention public interest questions raised by a competitor's application and — as already notes — any "delay" in considering a petition to deny is an

[24] Decision, Para. 11, 52 FCC 2d at 1178. However, the Commission's interest in preventing abuse of petitions to deny is not limited to petitions filed by existing licensees. The Presiding Judge also considered the issues involving Faulkner's conduct under the general hearing of "abuse of process." See 52 FCC 2d 1191. See also *Asheboro Broadcasting Co.*, 20 FCC 2d 1 (1969) — hearing ordered to determine whether filing of strike application involved abuse of process; and *State College Communications Corporation, supra*, — hearing ordered to determine whether a petition to deny a competition's application, allegedly filed in bad faith, invoived an abuse of process.

inseparable part of the statutory scheme. Rather, the strike petition policy is aimed at curbing abuses of the Commission's processes, particularly with respect to a licensee's efforts to block, impede or delay the grant of a competing application. Accordingly, in order to justify specification of a strike petition issue, the charging party must make a strong showing that delay is the primary and substantial purpose behind a petition to deny.

26. In determining this primary delaying purpose, we shall consider several factors, which, depending on the particular facts, may or may not all be present in the same case. The following factors are the principal ones which we consider as significant indications a petition to deny was filed primarily or substantially for purpose of delay. (a) Statements by the licensee's principals or officers admitting the obstructive purpose. (b) Withholding information relevant to disposition of the requested issues. The public interest is not served by concealing information in order to obtain the specification of hearing issues. When it appears a licensee has engaged in such conduct, this factor will be considered to determine the licensee's primary purpose. We point out our concern here is with the concealment of material facts, and is not intended to include insubstantial or decisionally-insignificant inaccuracies in petitions to deny. Where a petition contains outright misrepresentations, however, they will of course be relevant not only to an abuse of process evaluation, but will also raise independent questions regarding the licensee's basic character qualifications. (c) The absence of any reasonable basis for the adverse allegations in the petition. Should it appear that the allegations in the petition are specious, with little or no factual or legal basis, such evidence would tend to raise the question whether petitioner was acting in good faith. (d) Economic motivation indicating a delaying purpose. Generally, a licensee bent on delaying the grant of a competitor's application will do so because he expects to obtain an economic benefit by preserving the competitive *status quo* as long as possible. Such conduct is basically anti-competitive and totally incompatible with the public interest in promoting unfettered fair competition in broadcasting. The weight to be assigned to information or evidence considered under this factor will vary, depending on whether the licensee's expectation of economic benefit is supported by extrinsic evidence to this effect, or must be established circumstantially. However, we will not infer a "strike" motive from the mere filing of a petition to deny, even though some "benefit" may accrue to the licensee from normal processing delays.[25] (e) Other conduct of the licensee. When appropriate, the Commission will also consider other conduct of the licensee tending to show that the licensee's primary

[25] See *Gill Industries*, 56 FCC 2d 765, at 769 (1975), where we noted that the "mere existence of an ulterior economic motive in filing pleadings with" the Commission is not sufficient, without more, to establish an abuse of process.

purpose is delay. It is impossible to provide an all-encompassing list respecting such "other" conduct, beyond noting it would include matters such as licensee efforts to stir up litigation between third parties and a competing applicant, efforts to interfere with a competitor's financing of his proposal, efforts to hinder a competitor from obtaining necessary building or antenna sites — in short, any relevant conduct by the licensee indicating a purpose to delay or block the grant of a competitor's application.

27. We consider next the assignment of the burden of proof under a strike petition issue. As noted above, before a strike petition issue is even specified, the party requesting such an issue must make a strong threshhold showing that the primary and substantial purpose behind the licensee's petition to deny is delay. On consideration of the information which is said to justify a strike issue and the licensee's response thereto, we will then consider whether a strike issue is justified.

28. In the present case, it was possible to consider Faulkner's "strike" motives at the same time the Commission considered the application to which Faulkner's petition to deny and supplements thereto were directed, because Faulkner's renewal application had been consolidated for hearing with RC's application. But in the usual case, when a strike petition issue is directed against a licensee because of his efforts to block or delay the grant of a competitor's application, that issue usually will have to be resolved in a separate renewal proceeding involving the licensee's station. In such a renewal proceeding, we shall assign the evidentiary burdens in the manner we did in *State College Communications Corp.*, 58 FCC 2d at 467. The burden of introducing evidence on a strike petition issue against a licensee shall be on the party alleging improper conduct by the licensee. The burden of proof, however, shall be on the licensee both on the issue respecting whether the licensee's questioned petition to deny was filed for the primary and substantial purpose of delay, and on the ultimate issue of whether, in light of the evidence adduced under the foregoing issue, a grant of the licensee's renewal application would serve the public interest, convenience and necessity.

29. In our earlier Decision while we concluded that Faulkner filed a strike petition, we found it unnecessary to decide whether the sole — or even primary — purpose in doing so was to delay the grant of RC's application. We must now determine under the clarifying criteria enunciated herein whether Faulkner's primary and substantial purpose was to delay the proceeding and thus abuse our processes.[26]

[26] Faulkner argues it would be inequitable to apply any guidelines formulated in response to the Court's directive that we clarify the strike petition policy. Faulkner's claim that this would involve an impermissible retroactive application of new standards of conduct ignores two considerations. First, as noted in Para. 22, *supra*, the core of both the strike application and strike petition policies is the concept of abuse of process, which is of long-standing duration. See *Asheboro Broadcasting Co.*,

Essentially, the resolution of this question hinges on four specific matters: (a) the Loyd Madden affair, (b) the Whitman matter, (c) the Hollis Johnson-Thorburn telephone conversation, and (d) the Holey-Thorburn correspondence. Except for the Loyd Madden affair, the factual background of each of these matters has been discussed in detail above in Paras. 10–13 and 16.

30. *The Loyd Madden affair.* Briefly, the Madden affair assumed relevance in this proceeding because Faulkner included in its original petition to deny allegations that Hollis Johnson had fraudulently acquired a deed to land owned by Madden while representing Madden in bankruptcy proceedings. Although we declined to specify a hearing issue against RC on the basis of these allegations[27] , Faulkner's exploitation of the Madden affair was deemed relevant to the "abuse of process" issue designated against Faulkner and evidence concerning this matter was received at the hearing. In essence, the evidence shows that Thorburn (who had prepared the original petition to deny) knew the dispute between Madden and Hollis Johnson had been settled well before the petition to deny was filed and that Johnson had been awarded legal fees in exchange for the deed.

31. The findings of fact concerning this matter are set forth in Paras. 33–35 of the Initial Decision. In our judgment, those findings are untainted by any presumption of veracity favoring the testimony of one party over that of another, and since the findings are supported by substantial evidence, they are hereby reaffirmed. Moreover, after a reevaluation of the record, we reaffirm our conclusions stated in Para. 7 of the *Decision* (52 FCC 2d 1176) to the effect that Thorburn was aware the Madden affair had been settled several months before Faulkner filed the petition to deny, that Thorburn was attempting to create enmity between the Johnsons and Madden for his own selfish purposes, and that Thorburn's testimony on his role in the incident was evasive and contradictory.[28] In our judgment, Faulkner had little

20 FCC 2d 1, at 3 (1969), in which we noted the "extreme disfavor" with which we viewed a licensee's efforts to impede the inauguration of new competitive broadcast service. Secondly, since we have strengthened the requisite showing for determining what constitutes a strike petition, Faulkner will not be prejudiced should we conclude that the evidence supports such a determination when measured by an even more rigorous standard than was applied in our earlier Decision. *Cf. SEC* v. *Chenery Corp.*, 332 U.S. 194 at 203 (1947).

[27] 38 FCC 2d 67, at 70 (1972).

[28] Illustrative of the numerous contradictions and inconsistencies, Thorburn testified that between the filing of RC's opposition to Faulkner's petition to deny (July 25, 1968) and the subsequent filing by Madden of a grievance with the local bar Grievance Committee (October 21, 1968), he (Thorburn) had no contact with Madden (Tr. 359–360). When confronted with evidence to the contrary, Thorburn recalled that such a meeting had, in fact, occurred (Tr. 361, 373, 383). Thorburn was also unable to explain why Madden voluntarily forwarded a copy of the grievance complaint to him without any explanation. Finally, Thorburn admitted discussing with Madden the possibility of Madden's filing a grievance complaint. (Tr. 353–68, 372–73, 381–85). This circumstantial evidence strongly suggests that Thorburn

reasonable basis for raising this issue other than to delay the proceeding. Our conclusion in this regard is buttressed by other substantial evidence.

32. The evidence respecting the Whitman matter also provides a basis for concluding that Faulkner wanted to delay the grant of RC's application and used its June 1970 supplement for the primary and substantial purpose of delay. In that supplement, Faulkner claimed RC had misrepresented the availability of its antenna site and obtained specification of issues against RC. (Para. 12, *supra*). However, it turned out that it was *Faulkner* who had made misrepresentations by concealing a crucial fact in Whitman's purported affidavit (which had been drafted by Thorburn), namely, the fact that at the time the "affidavit" was drafted, the Whitman tract was not unavailable to RC, but rather, in a "check back" status. (Para. 13, *supra*). The only reasonable explanation for Thorburn's failure to disclose this decisionally significant fact is that it would have cast doubt on the need for our specifying the misrepresentation issue against RC. Thorburn's only explanation for not including this fact in the petition was he did not think it sufficiently important. See 52 FCC 2d at 1177, Tr. 266–8. That explanation is simply unbelievable and constitutes an additional layer of evidence indicating that there was an abuse of our processes.

33. The Hollis Johnson-Thorburn telephone conversation and the Holey-Thorburn correspondence served to corroborate our conclusion that issues raised in the original petition to deny and the June 1970 supplement were primarily intended to delay the proceeding and thereby abuse our processes. The Johnson-Thorburn telephone conversation (Paras. 10–11, *supra*), provides evidence—albeit conflicting—that Thorburn admitted a delaying purpose in filing the original petition to deny, and of the economic motivation for doing so. The Holey-Thorburn correspondence (Para. 16, *supra*), speaks for itself. It too serves to indicate that in May, 1968, several weeks before Faulkner filed its original petition to deny, Thorburn was already seeking ways to delay the processing of RC's application by filing a strike application. Although he decided not to pursue that course of action, this correspondence does serve to "indicate Thorburn's state of mind at the time as bent on delaying RC's application." (Decision, Para. 14). This extrinsic evidence of Faulkner's intent and motivation to delay the proceeding, coupled with requests for issues for which the underlying petitions either had an insufficient basis in fact or failed

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prompted Madden to file a complaint with the local bar Grievance Committee. While Thorburn denied this, his testimony is confusing and unpersuasive. Therefore, we reaffirm our earlier conclusion that Thorburn encouraged Madden to file the complaint. See 52 FCC 2d at 1179. Finally, Thorburn's statement that he initiated inquiry regarding the Madden matter in January, 1968 (Tr. 204, 279), and sought Madden's affidavit at that time, tends to contradict his later statement that he decided to file a petition to deny in April or May 1968 (Tr. 357).

fully to disclose all relevant and material facts, leaves us no doubt that Faulkner intended to abuse our processes and did so.

34. It is obvious from the foregoing that even under the more stringent strike petition criteria enunciated herein, the original petition to deny and the June 1970 supplement were strike petitions because they were filed for the primary and substantial purpose of delaying the grant of RC's application. We conclude, therefore, that such filings constitute a second separate and distinct ground for denying Faulkner's renewal application.

35. One other matter under the strike petition policy requires comment in view of Fn. 55 of the Court's opinion in *Faulkner, supra.* There the Court noted that we had declined in our Decision[29] to find that the remaining seven supplements to Faulkner's petition to deny were filed for the purpose of delay, a finding which the Court states in Fn. 55 "would seem necessary". We remain of the view that except for the June 1970 supplement, there is no basis for concluding that the supplements to Faulkner's petition were filed for the purpose of delay, for the reasons stated in Fn. 14 of the Decision. But in our judgment, this does not preclude a conclusion that the original petition to deny and the June 1970 supplement were filed for the primary and substantial purpose of delaying a grant of RC's application. Where a licensee files a series of pleadings directed to a competitor's application, the fact that only some of those pleadings are obstructive in nature does not lessen the abuse of process involved in other pleadings whose purpose is clearly obstructive.[30] And particularly is this so in a situation such as this, where the obstructive purpose is shown to exist from the very inception of the proceeding and is furthered by the subsequent filing of a pleading with an insubstantial basis (Faulkner's June 1970 supplement) and which filing is totally unprompted by any amendments on the competing applicant's part. In short, to paraphrase the language of the *Faulkner* opinion, the "illegitimate purposes associated with presentation of the [original] petition [and the June 1970 supplement] were substantial [and] . . . crucial" (557 F.2d at 876) and fully justify a conclusion Faulkner's primary and substantial purpose was delay, irrespective of the lack of any delaying purpose attaching to the remaining supplements.

36. Two other matters remain to be considered. The first is the Broadcast Bureau's motion to strike the comments of Talton Broadcast Company of Lee County (hereinafter "Talton").[31] Talton has

[29] Decision, Para. 13.

[30] The same reasoning applies to only a single pleading. Here, for example, the original petition to deny resulted in the specification of ascertainment and financial qualification issues against RC. But the fact that some issues raised in a petition may be bona fide ought not preclude inquiry, where appropriate, into whether other allegations in a petition were sought on the basis of licensee misrepresentations or concealment of information.

[31] In its comments, Talton alludes to a Petition for Expedited Grant filed in connection

applications pending before the Commission under which it proposes to acquire the licenses of two Faulkner-owned stations — WAOA, Opelika, Alabama (BAL–8507) and WFRI-FM, Auburn, Alabama (BALH–2184). The Bureau's motion to strike will be granted. Talton is not a party to these proceedings, has not sought to intervene, and, under our rules, has no right to file a pleading in this proceeding.

37. The final matter concerns the Broadcast Bureau's petition to reopen the record and designate an issue as to whether Robert Thorburn and/or any of Faulkner's principals have solicited or encouraged others to make *ex parte* presentations in violation of Sections 1.221(b), 1.225(a) and 1.227(e) of the Commission's Rules. In the circumstances, we do not believe any useful purpose would be served by reopening the record for further hearings on the Bureau's petition and the supplements thereto. Assuming *arguendo* that Faulkner was found to have violated the *ex parte* rules, the effect of such a finding would be purely cumulative because we have already concluded that Faulkner does not possess the requisite qualifications to remain the licensee of Station WLBB. Further, assuming that Faulkner was absolved of the *ex parte* charges, our conclusions respecting Faulkner's improper conduct would not be changed. In our judgment, the public interest would not be served by needlessly protracting this proceeding further.

38. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike Comments of Talton Broadcasting Company of Lee County, filed September 13, 1977 by the Broadcast Bureau, IS GRANTED.

39. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and to Enlarge the Issues, filed October 13, 1977 by the Broadcast Bureau, as supplemented on October 26, 1977, and October 27, 1977, IS DISMISSED.

40. IT IS FURTHER ORDERED, That the Motion for Leave to File Affidavit, filed December 9, 1977, by Faulkner Radio, Inc. IS DISMISSED as moot.

41. IT IS FURTHER ORDERED, That the above-captioned application (BR–1431) of Faulkner Radio, Inc. for renewal of license for standard broadcast station WLBB, Carrollton, Georgia IS DENIED.

42. IT IS FURTHER ORDERED, That Faulkner Radio, Inc. IS AUTHORIZED to continue to operate station WLBB until 12:01 AM, August 27, 1978, to enable the licensee to conclude that station's affairs; PROVIDED, HOWEVER, That if licensee seeks judicial review of our Memorandum Opinion and Order, it is authorized to continue to operate the station until thirty (30) days after the Court which has jurisdiction to review this proceeding issues its mandate.

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with the above-noted assignment applications. Talton urges its petition be considered by the Commission at the time it considers the relief requested by Faulkner in this proceeding. Talton also requests permission to participate in any oral argument the Commission may order in connection with this reconsideration on remand.

FEDERAL COMMUNICATIONS COMMISSION;
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX F

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 75-1568.

FAULKNER RADIO, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee, William P. Johnson and Hollis B. Johnson, doing business as Radio Carrollton,
Intervenor.

Argued April 8, 1976.

Decided May 26, 1977.

Before McGOWAN, ROBINSON and WILKEY, Circuit Judges.

Opinion for the Court filed by ROBINSON, Circuit Judge.

WILKEY, Circuit Judge, concurs in the result.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge:

Faulkner Radio, Inc., appeals from an order of the Federal Communications Commission denying renewal of its license to operate a radio station.[1] The challenge to the Commission's decision is rested on several grounds, including the claim that the Commission erred in attaching greater weight to the testimony of two parties who are lawyers, simply because they are lawyers, than to the testimony of opposing witnesses. We find that ground dispositive of the appeal, and remand the case to the Commission for reconsideration.

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On November 27, 1967, Radio Carrollton, a partnership consisting of two practicing attorneys, Hollis B. Johnson and William P. Johnson, filed an application for

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[1] *Radio Carrollton*, 52 F.C.C.2d 1173 (1975).

a permit to construct and operate a standard broadcast station in Carrollton, Georgia. Faulkner Radio, the licensee of Station WLBB, an existing standard broadcast facility in Carrollton, petitioned for denial of Radio Carrollton's application, questioning the applicant's financial and character qualifications as well as its ascertainment of community needs. Radio Carrollton's response tendered an affidavit by Hollis Johnson averring that Robert M. Thorburn, vice-president of Faulkner Radio, had admitted to him during a telephone conversation that the petition to deny had been filed for the purpose of delaying proceedings on the application. Thorburn, in turn, submitted a counter-affidavit disputing the substance of the statements attributed to him.

Over the next three years, there were numerous amendments to the application and supplements to the petition to deny. These generated additional character issues, and questions concerning the availability of an antenna site for Radio Carrollton and its compliance with the Commission's rules. Although Radio Carrollton's application for a construction permit and Radio Faulkner's later application for renewal of its license were not mutually exclusive from an engineering standpoint, and thus could both have been granted,[2] the Commission felt that the factual disputes "inextricably connect[ed] the applications" and consolidated them for a hearing "to permit an orderly resolution of the questions presented."[3] Among the issues which the Commission designated for hearing were:

> . . . [W]hether Radio Carrollton has complied with the provisions of section 1.65 of the Commission's rules[4] by keeping the Commission advised of sub-

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[2] When two or more applications for broadcasting licenses are mutually exclusive, they must be considered and resolved together; the Commission may not first grant one and then hear the other or others. *Ashbacker Radio Co. v. FCC*, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945); *James River Broadcasting Corp. v. FCC*, 130 U.S.App.D.C. 210, 211, 399 F.2d 581, 582 (1968).

[3] *Radio Carrollton*, 38 F.C.C.2d 68, 69 (1972).

[4] Section 1.65 of the Commission's rules, 47 C.F.R. § 1.65 (1976), provides in relevant part:

[footnote continued]

stantial and significant changes as required by section 1.65, and, if not, the effect of such noncompliance on its basic qualifications to be a Commission licensee.

. . . [W]hether Radio Carrollton misrepresented itself to the Commission pertaining to the availability of the land o ned by O. S. Whitman as an antenna site, and if so, what effect such conduct has on the basic qualifications of Radio Carrollton to be a Commission licensee.

. . . [W]hether Faulkner Radio, Inc., filed its petition to deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee. . . .

. . . [W]hether Faulkner Radio, Inc., or Radio Carrollton misrepresented itself to the Commission in its affidavit submitted concerning the conversation between Robert M. Thornburn [*sic*] and Hollis B. Johnson, and if so, what effect such conduct has on the basic qualifications of either applicant to be a Commission licensee.

. . . [I]n light of the evidence adduced pursuant to the foregoing issues, whether a grant of the Radio Carrollton application and/or renewal of the Faulkner license would serve the public interest, convenience, and necessity.[5]

At the hearing, on May 14-16, 1973, before an administrative law judge, conflicting testimony was presented as to the content of the telephone conversation between Thorburn and Hollis Johnson. According to Johnson,

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Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate.

[5] *Radio Carrollton, supra* note 3, 38 F.C.C.2d at 74-75.

Thorburn called and apologized for raising questions concerning Johnson's character, and said that because of Faulkner Radio's financial problems it needed to retard the granting of Radio Carrollton's application.[6] On the other hand, Thorburn maintained that the discussion occurred only in the context of his explanation to Johnson that the petition to deny probably would not lead to defeat of Radio Carrollton's application but rather to delay by several months. Thorburn further testified that he had not offered any apology for the attack on Johnson's character qualifications.[7]

Evidence concerning the availability of land owned by O. S. Whitman for an antenna site for Radio Carrollton was likewise contradictory. Thorburn submitted a document in the form of an affidavit signed by Whitman stating that he had informed the Johnsons that the property on which they held a by-then expired option would not be available for the antenna site.[8] That was significant because if Radio Carrollton knew that and did not notify the Commission thereof, it would have been guilty of misrepresentation and of violating the Commission's rules.[9] According to the Johnsons' testimony, however, Whitman had first told them that the land would be available despite expiration of the option,[10] and later had advised them that it might not be available but that he wanted to check with his son before he made any decision.[11] The Johnsons further claimed that they learned definitely that the land was not available only through the document brought forth by Thorburn.[12]

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[6]Joint Appendix (J.App.) 135-137, 157-158, 162, 176-178; *Radio Carrollton*, 52 F.C.C.2d 1187, 1192 (1975).

[7]J.App. 218-224, 346-350; *Radio Carrollton, supra* note 6, 52 F.C.C.2d at 1192-1193.

[8]At the hearing, Thorburn testified that Whitman had not deposed before a notary and thus the document was not really an affidavit. He further testified that Whitman had not been sworn when he signed the document. J.App. 264-266.

[9]See note 4 *supra.*

[10]J.App. 75.

[11]J.App. 77.

[12]J.App. 126.

The parties also presented divergent testimony on Thorburn's role in the filing of a grievance by one Loyd Madden against Hollis Johnson with the local bar association.[13] Although the Commission had refused to designate this incident as a character issue, the administrative law judge allowed the testimony as relevant to Faulkner Radio's motive underlying the petition to deny.[14]

The judge released his decision on April 15, 1974, refusing to renew Faulkner Radio's license and granting Radio Carrollton's application for a construction permit.[15] The judge resolved all conflicts in the evidence against Faulkner Radio. He found that it had set out deliberately "to mislead and deceive this Commission concerning . . . Radio Carrollton, for the purpose of thwarting or delaying the initiation of a competing broadcast service in Carrollton, Georgia."[16] The judge further found that Faulkner Radio

> was itself responsible for distortion of the facts in relation to the site availability matter; that the evidence is persuasive, as well as pervasive, regarding

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[13] Thorburn claims that Hollis Johnson coerced Madden into signing a deed in payment for legal fees. Johnson denied any impropriety in the transaction. J.App. 181-185, 191-195, 204-208, 280, 352-363, 372-374, 382-385.

[14] *Radio Carrolton, supra* note 6, 52 F.C.C.2d at 1200 n.14. The Commission declined to designate the matter as a character issue because neither the bar association's grievance committee nor the bankruptcy judge handling Madden's case had found impropriety on Johnson's part. *Radio Carrollton, supra* note 3, 38 F.C.C.2d at 70.

After the May, 1973, hearing, the Commission enlarged the issues on Faulkner Radio's petition, and further hearings were held on January 15-18, 1974, on the question whether one Al Cohen had a hidden one-third ownership interest in Radio Carrollton. *Radio Carrollton*, 43 F.C.C.2d 472, 475 (1973). The Johnsons denied that Cohen ever had any interest in the station. J.App. 84-87, 1113-1115, 1118-1123, 1133, 1138, 1143-1144, 1156, 1161-1163, 1171-1187, as did Cohen, J.App. 981-1094. Faulkner Radio produced several witnesses who avowed that they were told that Cohen did have such an interest. J.App. 694-696, 756-793, 804-817.

[15] *Radio Carrollton, supra* note 6.

[16] *Radio Carrollton, supra* note 6, 52 F.C.C.2d at 1221.

> Mr. Thorburn's wanton disregard of, and indifference to, the need for accuracy and truth in giving testimony on the so-called Whitman site episode, as well as upon other matters; that it was at least circumstantially apparent that Faulkner, through Thorburn, tried, most irresponsibly, to stir up further enmity against the Johnsons by a disappointed former client of their law firm when Thorburn knew, or ought to have been aware, that the dispute with the client had previously been settled, by seeking, with the help of an "affidavit" and allegations in a pleading, to revive the subject before this Commission; and that the Hollis Johnson version of the crucial telephone conversation he had had with Thorburn on June 20, 1968 must be accepted as substantially accurate and therefore credible, while Thorburn must be held to have either been reckless with the truth or to have wilfully misrepresented the facts in his version.[17]

Faulkner Radio filed exceptions to the decision. The Commission, after oral argument, affirmed, adopting substantially the administrative law judge's findings of fact.[18] Among the contentions in this court is Faulkner Radio's claim that the Commission's decision is pervasively infected by bias outwardly manifested by the judge during the hearing. One aspect of the alleged bias assertedly is the judge's assumption that the Commission indulges a presumption giving greater weight to the testimony of lawyers than that of persons pursuing other callings.[19] That the judge may have labored under that impression seems clear, for in his opinion he stated:

> It may be said, finally, that there is nothing more precious and vital to a practicing lawyer than his "good name"; that the Johnsons evidently are attorneys of some distinction in Carrollton, Georgia; and that the Commission, thus, has at least a presump-

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[17] *Radio Carrollton, supra* note 6, 52 F.C.C.2d at 1222.

[18] *Radio Carrollton, supra* note 1, 52 F.C.C.2d at 1175.

[19] Faulkner Radio also claims that the judge demonstrated bias against it by blaming it for the delay in the handling of Radio Carrollton's application.

tive basis for preferring the veracity of Mr. Hollis Johnson's testimony over Mr. Thorburn's, absent a persuasive justification to the contrary.[20]

The Commission's decision indicates that it reviewed the record fully and makes plain that it concurred for the most part in the judge's determinations of fact. The Commission also indicated that absent an abuse of discretion by the judge, it would not substitute its judgment as to credibility of the witnesses for that expressed by the judge.[21] Consequently, if the judge erred by according superior weight to the veracity of the lawyer-witnesses solely because they are lawyers, the decision of the Commission incorporates that error. And the likelihood, though not absolute certainty, that the judge pursued a legally impermissible course demands at a minimum an administrative reevaluation of the evidence.

II

Findings of fact by the Commission must be accepted by the courts when supported by substantial evidence in the record considered as a whole.[22] Beyond that, credibility resolutions by administrative law judges are entitled to great weight on judicial review of agency action.[23]

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[20] *Radio Carrollton, supra* note 6, 52 F.C.C.2d at 1223. The judge also found that Thorburn's testimony was marked with inconsistencies and evasiveness, which in the judge's view provided a basis for disbelieving his testimony. *Id.* We cannot be certain, however, that the judge would have reached the same conclusions with respect to credibility had he not decided to give preference to the testimony of the lawyer-parties.

[21] *Radio Carrollton, supra* note 1, 52 F.C.C.2d at 1180.

[22] Communications Act of 1934, ch. 652, § 402(e), 48 Stat. 1094, as amended, 47 U.S.C. § 402(e) (1970). See *FCC v. WOKO, Inc.*, 329 U.S. 223, 226, 67 S.Ct. 213, 215, 91 L.Ed. 204, 207 (1946); *Johnston Broadcasting Co. v. FCC*, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949).

[23] The power of administrative law judges to render initial decisions does not mean that the Commission is "relegated to the role of [a] reviewing court[] [which] sustain[s] fact finding of courts of first instance unless clearly erroneous." *Lorain Journal Co. v. FCC*, 122 U.S.App.D.C. 127, 131, 351 F.2d 824, 828 (1965) citing *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364, 75 S.Ct. 855, 859, 99 L.Ed. 1147, 1154 (1955). The

[footnote continued]

Neither type of determination can stand, however, when predicated upon a material error of law.[24] We think that such an error inhered in the judge's treatment of the Johnsons' version of the disputed events if it was favored merely because they are lawyers. We think, too, that at the very least there is more than enough doubt on that score to require a remand of this case to the Commission.

As Dean Wigmore has observed in a related context, "it can be said that there are no rules, in our system of Evidence, prescribing for the jury the precise effect of any general or special class of evidence."[25] And while the principles governing use of evidence in administrative tribunals are not wholly congruent with those obtaining in the courts,[26] administrative no less than judicial rulings must respect standards of reason and fair play.[27]

If the trier of fact automatically credits or repudiates testimony of a witness simply because he is one of a group pursuing a particular vocation, the normal burden of proof is in some wise altered, and arbitrarily so.[28] When one party's witness is preferred for that reason alone, the opposing party is summoned to produce additional evidence sufficient to overcome the presumptive weight bestowed upon that witness. And since

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Commission's decision must be upheld when it is supported by substantial evidence in the record even if there is also substantial evidence to support the contrary decision of the judge. *Lorain Journal Co. v. FCC, supra.* The Commission also possesses authority to reject credibility assessments of the judge. *Cf. Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB,* 151 U.S.App. D.C. 209, 215-216, 466 F.2d 380, 386-387 (1972).

[24] See *Victor Prods. Corp. v. NLRB,* 93 U.S.App.D.C. 56, 59-60, 208 F.2d 834, 838-839 (1953); *Breeden v. Weinberger,* 493 F.2d 1002, 1010 (4th Cir. 1974). See also *D.C. Transit Sys., Inc. v. Washington Metropolitan Area Transit Comm'n,* 151 U.S.App.D.C. 223, 243, 466 F.2d 394, 414, *cert. denied,* 409 U.S. 1086, 93 S.Ct. 688, 34 L.Ed.2d 673 (1972); *Jefferson Standard Broadcasting Co. v. FCC,* 305 F.Supp. 744, 748 (W.D.N.C. 1969).

[25] 1 J. Wigmore, Evidence § 26 at 401 (3d ed. 1940).

[26] See generally 2 K. Davis, Administrative Law §§14.01 to 14.17 (1958).

[27] See cases cited *supra* note 24.

[28] As to the burden of proof in Commission proceedings, see § 309(e) of the Communications Act, 47 U.S.C. § 309(e) (1970).

membership in a general class may or may not reflect on an individual member's veracity,[29] there is necessarily an impingement upon the full and fair hearing that Congress has mandated[30]—"a hearing . . . essential for wise and just

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[29]The witness' occupation may in given situations be a factor bearing on his credibility. *Wilson v. State*, 31 Ala.App. 21, 11 So.2d 563, 566 (1942), *cert. denied*, 243 Ala. 671, 11 So.2d 568 (1943); *State v. Owen*, 73 Idaho 394, 253 P.2d 203, 208 (1953); *State v. Swisher*, 364 Mo. 157, 260 S.W.2d 6, 12 (1953). But the fact that the occupation is respectable—even exalted—does not of itself elevate the witness' testimony above that of any other reputable witness.

> The profession of a preacher does not necessarily invest a man with that purity of morals which renders him more scrupulous in declaring the truth than another man; for it sometimes happens, that even the members of that sacred vocation are overpowered by the temptations to vice. That a witness is a preacher, ought, if proved, to be stated to the Jury, that they may judge how far that circumstance entitles his testimony to additional weight; but even then a Jury would draw their conclusions from his individual character, and its correspondence with his profession, rather than from the profession itself. The instruction given in this case can only be sanctioned by assuming the position, that a preacher *ex vi termini*, denotes a person whose evidence is entitled to greater weight than that of another man: whereas, a preacher whose life and profession are at variance, is less entitled to confidence than another man, since to his other vices he adds that of hypocricy; and he who could impiously aim to deceive the Deity, would not scruple to mislead his creatures.

Sneed v. Creath, 8 N.C. 309, 312 (1821). Compare *Flynn ex rel. Chin King v. Tillinghast*, 32 F.2d 359, 360 (D. Mass. 1929), *rev'd on other grounds*, 38 F.2d 5 (1st Cir.), *cert. denied*, 281 U.S. 768, 50 S.Ct. 467, 74 L.Ed. 1176 (1930) (race); *Bliss v. Bliss*, 161 Mo.App. 70, 142 S.W. 1081, 1082 (1912) (sex); *Barefoot v. Lee*, 168 N.C. 89, 83 S.E. 247, 248 (1914) (sex); *Texas Employers Ins. Ass'n v. Haywood*, 153 Tex. 242, 266 S.W.2d 856, 859 (1954) (race).

[30]In § 309(e) of the Communications Act, 47 U.S.C. § 309(e) (1970), Congress provided for hearings where "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in" § 309(a)—that the public interest, convenience and necessity will be served by a grant of the application. The Supreme Court has held that in § 309(e) hearings "every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202, 76 S.Ct. 763, 770, 100 L.Ed. 1081, 1090 (1956).

application of the authority of administrative boards and agencies."[31] We do not suggest, of course, that the discretion of administrative law judges or agencies in assessing credibility on the personal qualities of witnesses is in any way to be curtailed. We say only that by what seemingly was a class-presumption applied in this case, Faulkner Radio may have been deprived of an opportunity to have its evidence objectively considered.

The precise point we stress would appear to many as self-evident, and perhaps that explains why it apparently has not heretofore been squarely addressed in a reported decision. Nonetheless, we are not without support in precedent. In *Milton Broadcasting Co.*,[32] the Commission, in a license renewal proceeding, concluded that an administrative law judge had been influenced in judging credibility by his sympathy for the poor physical condition of the owner of the licensee, and thereby had shifted the burden of proof from the licensee to the Commission's Broadcast Bureau.[33] Though indicating its reluctance to substitute its own findings on credibility for those of the judge, the Commission realized that it would be "derelict in [its] statutory duty" to accept findings by the judge which conflicted with evidence in the record.[34] To recite the *Milton* holding is not to intimate a view as to whether the judge's credibility resolutions here are unsupported by the evidence as in *Milton*. That decision is one for the Commission in the first instance.

We may look also to our own decisions requiring trial judges, on request, to inquire on voir dire examination of prospective jurors as to whether any of them would attribute more weight to the testimony of a police officer, just because he is a police officer, than they

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[31] *Id.*

[32] 34 F.C.C.2d 1036 (1972).

[33] *Id.* at 1043-1045. In license renewal proceedings, the licensee shoulders the burden of proving that renewal is in the public interest. Communications Act of 1934, § 309(a), (e), 47 U.S.C. § 309(a), (e) (1970).

[34] *Milton Broadcasting Co., supra* note 32, 34 F.C.C.2d at 1045.

would give to the testimony of another witness.[35] "[W]hen important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more, or less, inclined to credit their testimony," we have said, "a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested."[36] While those cases do not dictate specifically that jurors who answer in the affirmative must be excused for cause, that is the implication of the logic of the decision in those cases. We cannot believe that the result here should differ merely because the proceeding is civil in nature and the presumptive bias favors members of the bar instead of police officers.

We also draw support for our view from a comparatively recent case in the Third Circuit. In *United States v. Thompson*,[37] the court held that a judge was required to disqualify himself when it was averred that he was personally biased against a class of defendants—those convicted of violating the selective service laws. The defendant and his attorney had supplied pretrial affidavits charging that the judge had stated that it was his policy to "sentence all violators to thirty (30) months in prison if they are good people," and to four and a half years if they were black militants.[38] Deeming this class

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[35] *Salley v. United States*, 122 U.S.App.D.C. 359, 361, 353 F.2d 897, 899 (1965); *Brown v. United States*, 119 U.S.App.D.C. 203, 204-205, 338 F.2d 543, 544-545 (1964); *Sellers v. United States*, 106 U.S.App.D.C. 209, 210, 271 F.2d 475, 476 (1959). Accord, *Chavez v. United States*, 258 F.2d 816, 819 (10th Cir. 1958), *cert. denied, sub nom. Tenorio v. United States*, 359 U.S. 916, 79 S.Ct 592, 3 L.Ed.2d 577 (1959) (dictum).

[36] *Brown v. United States, supra* note 35, 119 U.S.App.D.C. at 205, 338 F.2d at 545. We also noted that not every failure to put the question necessarily leads to reversal, but that "the issue turns on the degree of impact which the testimony in question would be likely to have had on the jury and what part such testimony played in the case as a whole." *Id.* Since in the present case the administrative law judge's decision depended on resolution of the conflicting testimony of the lawyer- and nonlawyer-witnesses, an announced preference for the veracity of lawyers' testimony would clearly constitute fundamental error.

[37] 483 F.2d 527 (3d Cir. 1973).

[38] *Id.* at 528.

bias, the court concluded that it was sufficient to call for recusal.[39] We recognize, of course, that disqualification of the judge was mandated by a statute not applicable here,[40] but that is beside the point. The fair hearing contemplated by Congress demands as much as the disqualification statute does; as we have declared,

> an administrative hearing [which is] of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.[41]

In the case before us, the administrative law judge noted the undoubted value of a lawyer's "good name"[42] and the apparent fact that the Johnsons bore "some distinction" in Carrollton.[43] The judge did not limit these considerations to circumstantial interplay as factors pertinent to credibility, however, but ruled on the premise—which he attributed to the Commission—that there was "at least a presumptive basis for preferring the veracity of Mr. Hollis Johnson's testimony over Mr. Thorburn's, absent a persuasive justification to the contrary."[44] These pronouncements are certainly readable in combination as

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[39] *Id.* at 528-529. Since the court held that recusal was mandated by virtue of the alleged bias against those convicted of violating the selective service laws, it did not reach the question whether recusal was also required because of claimed bias against black militants. *Id.*

[40] 28 U.S.C. § 144 (1970) provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

[41] *Amos Treat & Co. v. SEC,* 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267 (1962).

[42] See text *supra* at note 20.

[43] See text *supra* at note 20.

[44] See text *supra* at note 20.

the expression of a view that the testimony of Hollis Johnson, a lawyer, was for that singular reason surrounded by a presumption entitling it to a preferred status over the testimony of a layman. At the bare minimum, one cannot say with even the slightest degree of confidence that the judge's ruling—which the Commission unreservedly adopted—was not bottomed on that predicate. Whichever way the judge's explanation is interpreted, then, a remand for reconsideration is necessary to assure that Faulkner Radio's evidence is evaluated without the impediment of a presumption of veracity indulged an opposing lawyer-witness solely because he happens to be a lawyer.

III

Because the case must return to the Commission for new findings of fact, we feel compelled to make known, for guidance of the Commission, our concern as to the ambiguity of the Commission's findings with respect to motivation underlying Faulkner Radio's petition to deny, and with some of the implications of the Commission's discussion of strike petitions.

The Commission has heretofore held that where one of the purposes of a license application is "the obstructing, impeding, or delaying of a grant of another application," the former is a strike application and its filing "places in jeopardy the authorization for the existing station which is the intended beneficiary of the strike application."[45] The Commission has further stated that

> [t]his policy obtains even if the intention to obstruct, impede, or delay is not the sole reason for participation and even if the strike applicant intends to build and operate the proposed station if his application is granted.[46]

In *Pressley v. FCC*,[47] we noted that "[t]hese words are not a model of clear and complete statement which will

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[45] *Asheboro Broadcasting Co.*, 20 F.C.C.2d 1, 3 (1969).

[46] *Id.*

[47] 141 U.S.App.D.C. 283, 437 F.2d 716 (1970).

give adequate prior notice of a standard by which conduct can be measured,"[48] and we called upon the Commission to develop regulations to provide guidance to licensees.[49] In response to our decision, the Commission identified an essential ingredient of strike applications.[50] "To be considered a 'strike' application," the Commission said, "the motive or purpose—principal or incidental—must be to obstruct or delay another application."[51] The Commission also set forth some criteria for determining whether an application is or is not a strike application: "(1) the timing of the application, (2) the economic and competitive benefit occurring from the application, (3) the good faith of the applicant, and (4) questions concerning a frequency study."[52]

Although these guidelines were established for use in evaluating applications, the Commission, starting with the instant case, has begun to utilize them to similarly evaluate petitions to deny.[53] The administrative law judge concluded that "Faulkner Radio, Inc. had filed its Petition to Deny, not for a praiseworthy purpose of bringing pertinent information concerning its adversary to the Commission's attention bearing on the public interest but instead for the invidious or underhanded purpose of delaying the processing of Radio Carrollton's application. . . ."[54] The Commission, in turn, applying the strike-application criteria to Faulkner Radio's petition, concluded that it was a strike petition.[55] More particu-

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[48] *Id.* at 288 n.5, 437 F.2d at 721 n.5.

[49] *Id.* at 288-289, 437 F.2d at 721-722.

[50] *Grenco, Inc.*, 28 F.C.C.2d 166, 167 (1971).

[51] *Id.*

[52] *Id.*

[53] *Radio Carrollton, supra* note 1, 52 F.C.C.2d at 1178. See, *e.g.*, *State College Communications Corp.*, 58 F.C.C.2d 462 (1976); *Gill Indus.*, 56 F.C.C.2d 765, 769 (1975).

[54] *Radio Carrollton, supra* note 6, 52 F.C.C.2d at 1223.

[55] *Radio Carrollton, supra* note 1, 52 F.C.C.2d at 1178-1179. Although the Commission in another case has indicated, in discussing Faulkner Radio's petition, that one factor in its decision was the volume and timing of the seven supplements to Faulkner's

[footnote continued]

larly, with respect to Faulkner's good faith, the Commission held:

> (1) The Thorburn-Holey correspondence of May, 1968 indicates that Thorburn was then in fact contemplating a strike application. The fact he never filed such application is immaterial, for, as the Judge determined, such contemplation would indicate Thorburn's state of mind at the time as bent on delaying [Radio Carrollton's] application. (2) Also in May, 1968, Thorburn misrepresented to Whitman the supposed legal action the Johnsons contemplated respecting the antenna site, thereby securing Whitman's written statement adverse to the Johnsons.[56] But, the evidence shows, Whitman had not then actually declared the site unavailable. (3) The next month, Faulkner filed its petition to deny. Based on Thorburn's experience in filing a similar petition in the Slidell proceeding,[57] raising identical types of issues (*i.e.*, ascertainment of needs, financial and character) as those in the Carrollton petition, Faulkner knew or should have known the petition would probably delay [Radio Carrollton's] application considerably. And, as already mentioned, the character allegations of the petition centered about the Madden dispute, which Thorburn knew or should have known had already been settled.[58] (4) Hollis Johnson's version of the crucial June 20, 1968 telephone conversation . . . attributed to Thorburn, *inter alia*, an account of Faulkner's financial difficulties and the unprofitability of radio ventures, and the statement that the petition to deny had been filed to obtain four or five months'

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petition, *Gill Indus.*, *supra* note 53, 56 F.C.C.2d at 769, we note that the Commission declined to find in its decision on Faulkner's petition that the supplements were filed for the purpose of delay. *Radio Carrollton*, *supra* note 1, 52 F.C.C.2d at 1179 & n.14. That finding would seem necessary since the Commission held that most of Faulkner Radio's supplements came in response to amendments to Radio Carrollton's application. *Id.*

[56]See text *supra* at notes 8-12.

[57]One year before filing the petition to deny Radio Carrollton's application, Faulkner Radio submitted a similar petition against an applicant for a Radio station in Slidell, Louisiana. J.App. 347.

[58]See notes 13-14 *supra* and accompanying text.

> delay.[59] (5) Thorburn then sought to obtain a non-competition covenant from Cohen, then a key employee of Faulkner in Carrollton.[60] This action plainly was designed to prevent [Radio Carrollton] from obtaining experienced staff in Carrollton should it receive a grant. (6) And finally, Thorburn apparently encouraged Madden to file a complaint against Hollis Johnson with the local bar grievance committee on which, as Faulkner itself points out, the committee advised Madden and the Commission it lacked authority to act.[61] The committee further informed Madden if he wanted to pursue the matter he should contact either the county grand jury or the Georgia State Bar. The presumed lack of any merit to Madden's grievance is indicated by the fact there is no evidence Madden ever did so.[62]

Assuming *arguendo* that these findings were bolstered by substantial evidence in the record,[63] they might support the conclusion that a substantial reason for presentation of the petition to deny was an illegitimate objective. But, the Commission, unlike the administrative law judge,[64] declined to specifically find that a purpose to impede, obstruct or delay was the primary or even a substantial reason for the filing of the petition. Relying on its strike-application policy, the Commission declared that

> the evidence clearly demonstrates Faulkner did file a strike petition. Plainly, one of Faulkner's purposes was to obstruct, impede and delay the grant of [Radio Carrollton's] application. It is unnecessary to find this was Faulkner's sole—or evey primary—purpose in order . . . to put its license in jeopardy.[65]

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[59] See text *supra* at note 6.

[60] See note 14 *supra.*

[61] See note 14 *supra.*

[62] *Radio Carrolton, supra* note 1, 52 F.C.C.2d at 1179.

[63] See Part II *supra.*

[64] See text *supra* at note 54.

[65] *Radio Carrollton, supra* note 1, 52 F.C.C.2d at 1180.

Our concern stems from this refinement, which leaves open the possibility that a licensee jeopardizes its license when it tenders a petition to deny for bona fide public-interest reasons but it also has an incidental—perhaps even a distinctively minor—purpose to retard progress on another's application. Such a policy might well have a chilling effect on the submission of petitions to deny by competitors—those most likely to bring an applicant's deficiencies to the Commission's attention.[66] The Commission seemingly has recognized this difficulty since in a recent opinion designating for hearing the question of a licensee's motive in filing a petition to deny, it said:

> While we in no way intend to cast a chilling effect upon the filing of applications, petitions to deny or other pleadings by licensees against competitors or potential competitors, we will not hesitate to take appropriate and necessary action where information comes to our attention which indicates that a licensee may have filed in bad faith—i.e., to block, impede or delay the grant of another application.[67]

We are not persuaded that the Commission will not "cast a chilling effect" if it fails to clarify the standard it will apply in evaluating petitions to deny. Nor are we satisfied that a chill is avoidable so long as the Commission proposes to penalize licensees on the basis of its analysis of their subsidiary motives. Congress has conferred standing upon interested parties to enable them to convey information bearing on the qualifications of licensees and potential licensees to the Commission.[68]

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[66]Competitors have been granted standing before the Commission and the courts because "such persons might well be the only ones sufficiently interested to contest a Commission action." *United Christ Church v. FCC*, 123 U.S.App.D.C. 328, 335, 359 F.2d 994, 1001 (1966) citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869, 875 (1940). *Cf. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S.Ct. 523, 530, 5 L.Ed.2d 464, 472 (1961) ("it is quite probably people with . . . a hope of personal advantage who provide much of the information upon which governments must act").

[67]*State College Communications Corp., supra* note 53, 58 F.C.C.2d at 466.

[68]See note 66 *supra*. Cf. Johnson & Dystel, *A Day in the Life: The Federal Communications Commission*, 82 Yale L.J. 1575, 1617 (1973).

Any policy which would seriously inhibit this vital flow of intelligence might be inconsistent with the congressional mandate, and injurious of the public interest as well.

A decision by the Commission subsequent to its disposition of this case, however, suggests that its intent may not be that an incidental motive to delay or impede will turn an otherwise bona fide, well grounded petition to deny into a strike petition. In *Gill Industries,*[69] the Commission refused to find an abuse of process, holding that "the mere existence of an ulterior economic motive in the filing of pleadings before this Commission is not sufficient to establish abuse of process without the exacerbating factors present in, *e.g., Radio Carrollton*...."[70] The Commission took pains to describe the conduct of Faulkner Radio that resulted in its conclusion in the present case:

> [T]hat decision was based on, *inter alia*, the nature of the prosecution and delaying tactics as well as the petitioner's financial interest in preventing the institution of a competing service.... [Faulkner Radio's] tactics were designed to delay the proceeding, including unwarranted delay in the filing of petition to enlarge issues, filing of a false affidavit, attempts to stir up already settled local litigation, and attempts to convey a false impression.[71]

This characterization of Faulkner Radio's activities suggests that the Commission may have believed that illegitimate purposes associated with the presentation of the petition were substantial or even crucial, and that any service to the public interest was minimal. That rationalization is not supplied by the Commission's decision in this case, however, and thus cannot be considered on this

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[69] *Supra* note 53.

[70] *Gill Indus., supra* note 53, 56 F.C.C.2d at 769. The Commission may, however, be drawing a distinction between petitions filed for purposes of delay and those accompanied by other types of ulterior economic motive, since in *Gill* the Commission pointed out that there were no allegations that the petition there was prompted by any desire to delay.

[71] *Id.*

review. On remand, the Commission will be well advised to clarify its policy on strike petitions and, if it finds Faulkner Radio's petition to be of that character, to specify the precise basis for that conclusion.

The order appealed from is vacated, and the case is remanded to the Commission for further proceedings in conformity with this opinion.

Vacated and remanded.

APPENDIX G

F.C.C. 76-870

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of FAULKNER RADIO, INC. For Renewal of Licenses for	
STATION WAOA, OPELIKA, ALABAMA	Docket No. 20910 File No. BR-4723
STATION WFRI(FM), AUBURN, ALABAMA	Docket No. 20911 File No. BRH-2748
STATION WBCA, BAY MINETTE, ALABAMA	Docket No. 20912 File No. BR-3448
STATION WWSM(FM), BAY MINETTE, ALABAMA	Docket No. 20913 File No. BRH-1629
STATION WGAA, CEDARTOWN, GEORGIA, AND	Docket No. 20914 File No. BR-1142
STATION WBTR(FM), CARROLLTON, GEORGIA	Docket No. 20915 File No. BRH-1705

ORDER

(Adopted: September 15, 1976; Released: September 22, 1976)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned applications for renewal of licenses, filed by Faulkner Radio, Inc., for Stations WAOA, Opelika, Alabama; WFRI(FM), Auburn, Alabama; WBCA and WWSM(FM), Bay Minette, Alabama; WGAA, Cedartown, Georgia; and WBTR(FM), Carrollton, Georgia.

2. To place our consideration of the above-captioned applications in proper perspective, we note, by way of background, that on November 21, 1972, Faulkner Radio, Inc.'s application for renewal of license for Station WLBB, Carrollton, Georgia, was designated for evidentiary hearing. This hearing was ordered to determine, among other things, whether Faulkner Radio, Inc. had: (i) filed a petition to deny against

another applicant's non-mutually exclusive application for a new standard broadcast station in Carrollton for the purpose of delaying the processing of that application; and (ii) misrepresented itself or was lacking in candor in its dealing with the Commission. *Radio Carrollton et al.*, 38 FCC 2d 68 (1972). The Administrative Law Judge, in an Initial Decision released April 15, 1974, found that Faulkner Radio, Inc. had not only filed its petition to deny for "* * * the invidious or underhanded purpose of delaying the processing of Radio Carrollton's application by the Commission and its staff," but, also, through its Vice-President, Robert Thorburn, on several instances, was "* * * either * * * reckless with the truth or * * * wilfully misrepresented the facts * * *." 52 FCC 2d at 1222-23, 1226. The Administrative Law Judge concluded, therefore, that, "* * * due to its demonstrated insincerity, the public interest cannot be served by granting * * * [Faulkner Radio, Inc.'s] application for renewal of license * * *" for WLBB; and, accordingly, recommended denial of the license.

3. Upon appeal, the Commission affirmed the Administrative Law Judge's Initial Decision. *Radio Carrollton et al.*, 52 FCC 2d 1173 (1975). In so doing, the Commission found, among other things, that:

> * * * the record indicates Thorburn misrepresented facts and lacked candor by fraudulent and knowing submission of the false affidavit, and by his evasive and misleading testimony at hearing * * *. Here again, we believe the Judge's determination as to the credibility of the witnesses should not, absent some indication of abuse of discretion, be disturbed. The record evidence indicates Thorburn in his affidavit and testimony was either reckless with the truth or wilfully misrepresented facts. * * *.
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> * * * * *
>
> The Commission and the Courts have consistently held that false statements, misrepresentations or lack of candor by applicants or licensees in the course of Commission proceedings raise substantial questions of basic character qualification. (citations omitted). We agree with the Judge that we cannot condone deception, even 'useless deception', by licensees, especially experienced broadcasters, and that the fact of concealment by a licensee or applicant is more significant than even the facts concealed. (citation omitted). Faulkner placed its license in jeopardy by filing a strike petition to deny. It also displayed lack of candor and committed knowing and wilfull misrepresentations by both the testimony of Thorburn at hearing and by his seeking to deceive the Commission through submission of an affidavit that was in no sense a real affidavit. In view of the nature and degree of Thorburn's misconduct, we conclude that Faulkner does not possess the requisite character qualifications of a Commission licensee * * *.

Radio Carrollton et al., 52 FCC 2d at 1180, 1182.

4. The above-captioned applications have been fully processed, and, except for the matters discussed above, Faulkner Radio, Inc. appears qualified. However, due to the serious nature of the conclusions in *Radio Carrollton, Inc., supra*, including the direct involvement of one of the licensee's principals in the misconduct found therein and the nature of the misconduct—i.e., giving evasive and misleading testimony at the hearing—we believe that a substantial and material question exists regarding Faulkner Radio, Inc.'s qualifications to remain a licensee of this Commission. Therefore, we believe that the above applications must be designated for oral argument to determine what effect, if any, the basic character qualification finding made against Faulkner Radio, Inc. in that proceeding has with respect to the licenses of its remaining broadcast holdings.

5. Concerning the above, we view the findings relating to licensee's character qualifications in *Radio Carrollton* as being *res judicata* as to all of its other broadcast holdings. Further, since there are no factual disputes to be resolved, but, rather, only the question as to what effect the misrepresentations made in the above proceeding may have on licensee's basic qualifications, in lieu of the normal evidentiary hearing we will order that an oral argument be held before the Commission *en banc* on the issues specified below. Faulkner Radio, Inc. is being directed herein to file a brief to the Commission concerning its position on the specified issues as well as other matters it may deem of relevance to our final determination. The Broadcast Bureau, which is being made a party to this proceeding, may also submit a brief. Both parties may file reply briefs.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications for renewal of licenses for Stations WAOA, WFRI(FM), WBCA, WWSM(FM), WGAA, and WBTR(FM), filed by Faulkner Radio, Inc., ARE DESIGNATED FOR ORAL ARGUMENT BEFORE THE COMMISSION EN BANC, in Washington, D.C., on November 29, 1976, beginning at 2:00 p.m., upon the following issues:

1. To determine, in light of the Commission's findings in the matter of *Radio Carrollton et al.*, 52 FCC 2d 1173 (1975), whether Faulkner Radio, Inc. possesses the requisite qualifications to be a broadcast licensee of this Commission.
2. To determine, in light of the arguments made with respect to the foregoing issue, whether a grant of the above-captioned applications for renewal of licenses would serve the public interest, convenience and necessity.

7. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, Faulkner Radio, Inc., pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, shall, within 20 days of the release of this Order, file with the Commission, in triplicate, a written notice stating an intention to appear on the date and time fixed for the Oral Argument and present arguments on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the Broadcast Bureau is made a party to the Oral Argument ordered herein and may participate to the extent it deems necessary to assure that the Commission is fully advised with respect to the foregoing issues.

9. IT IS FURTHER ORDERED, That Faulkner Radio, Inc. shall, within 30 days of the release of this Order, file with the Commission a written brief stating its position on the issues specified herein. The Broadcast Bureau may also file, within 30 days of the release of this Order, a written brief stating its position on the issues specified herein. Within 15 days after the deadline for filing initial briefs, both parties may file reply briefs.

10. IT IS FURTHER ORDERED, That, in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding and the burden of proof with respect to all the issues herein shall be upon Faulkner Radio, Inc.

11. IT IS FURTHER ORDERED, That Faulkner Radio, Inc. shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.594 of the Commission's Rules, give notice of the oral argument ordered herein within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of the notice as required by Section 1.594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX H

FCC 75-492

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, D.B.A. RADIO CARROLLTON, CARROLLTON, GA. For Construction Permit	Docket No. 19636 File No. BP-17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. For Renewal of License	Docket No. 19637 File No. BR-1431

APPEARANCES

Samuel Miller and *Mark E. Fields* (Miller & Fields) on behalf of William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton; *Frank U. Fletcher*, *Marvin Rosenberg*, *Edward W. Hummers, Jr.* and *H. Gifford Irion* (Fletcher, Heald, Rowell, Kenehan & Hildreth) on behalf of Faulkner Radio, Inc. (WLBB); and *Walter C. Miller* and *Eric S. Kravetz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted April 30, 1975; Released May 8, 1975)

COMMISSIONER JAMES H. QUELLO FOR THE COMMISSION: [1]

1. This proceeding involves the application of Radio Carrollton (RC) [2] for a construction permit for a new standard broadcast station, and the application of Faulkner Radio, Inc. (Faulkner) for renewal of its license for standard broadcast station WLBB, both at Carrollton, Georgia. Although the two applications were *not* mutually exclusive, Faulkner filed a petition to deny and several supplements thereto, requesting RC's application either be denied or designated for hearing on the basis of ascertainment of needs, financial qualifications and character issues. The Commission designated the applications for consolidated hearing on the following issues (38 FCC 2d 68):

> 1. To determine the efforts made by Radio Carrollton to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

[1] Commissioner Reid, who did not hear oral argument, has read the transcript of the oral argument and is participating in this Decision pursuant to Section 1.277(f) of the Rules.
[2] Radio Carrollton is a partnership consisting of William P. Johnson and Hollis B. Johnson, who are unrelated.

2. To determine with respect to the application of Radio Carrollton:

(a) Whether the commitments by the Commercial Bank, West Georgia National Bank, and Peoples Bank are still available to the applicant;

(b) Whether the partners possess adequate current assets to finance the proposed station; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

3. To determine whether Radio Carrollton has complied with the provisions of section 1.65 of the Commission's rules by keeping the Commission advised of substantial and significant changes as required by section 1.65, and, if not, the effect of such non-compliance on its basic qualifications to be a Commission licensee.

4. To determine whether Radio Carrollton misrepresented itself to the Commission pertaining to the availability of the land owned by O. S. Whitman as an antenna site, and, if so, what effect such conduct has on the basic qualifications of Radio Carrollton to be a Commission licensee.

5. To determine whether Faulkner Radio, Inc., filed its petition to deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee.

6. To determine whether Faulkner Radio, Inc., or Radio Carrollton misrepresented itself to the Commission in its affidavit submitted concerning the conversation between Robert M. Thorburn and Hollis B. Johnson, and, if so, what effect such conduct has on the basic qualifications of either applicant to be a Commission licensee.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the Radio Carrollton application and/or renewal of the Faulkner license would serve the public interest, convenience, and necessity.

2. Hearings were held in Atlanta, Georgia on May 14–16, 1973. On June 27, 1973, Faulkner filed a petition to enlarge the issues, requesting a hidden ownership issue against RC. The Review Board granted Faulkner's petition to enlarge and added the following issue (43 FCC 2d 472):

To determine whether Al Cohen has and/or had a one-third ownership interest in Radio Carrollton, and whether William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton, have been lacking in candor with the Commission concerning this interest, and, if so, to determine the effect thereof upon the applicant's qualifications to be a Commission licensee.

Further hearing sessions limited to the new issue were held January 15–18, 1974, with the record being closed on the latter date.

3. In an Initial Decision, FCC 74D–25, released April 15, 1974, Administrative Law Judge David I. Kraushaar determined that a grant of RC's application would serve the public interest. But because of Faulkner's lack of candor and misrepresentations, and because its

petition to deny and eight supplements thereto [3] were considered to have been filed primarily to delay Commission processes in order to frustrate prospective competition, he concluded the public interest would not be served by renewing Faulkner's license. Faulkner filed exceptions to the Initial Decision and a supporting brief. RC and the Broadcast Bureau filed replies to Faulkner's pleadings. Oral argument before the Commission *en banc* was held on November 12, 1974.[4]

4. We agree completely with the Judge that the record demonstrates Faulkner's renewal application should be denied and RC's application for a construction permit should be granted. We have fully considered the Judge's findings and conclusions in light of the arguments urged by the parties in pleadings and at oral argument, and they are adopted except as modified in this Decision and in our rulings on the exceptions, as set forth in the attached Appendix.

5. Judge Kraushaar found that Faulkner filed its petition to deny primarily to stave off prospective competition. He further found Faulkner lacked candor and committed knowing and willful misrepresentation both through the hearing testimony of Robert M. Thorburn (a broadcaster of some 14 years' experience who is Vice-President and General Manager of Faulkner's Carrollton stations) [5] and by Thorburn's submission to the Commission of an affidavit that was not a genuine affidavit.

6. In urging reversal, Faulkner argues in essence that: (1) It had a reasonable basis for presenting the Madden, Whitman and Cohen matters to the Commission; (2) Because it had a legitimate interest in the kind of competition it might face, it had standing as a party in interest to file its petition to deny, *FCC v. Saunders Brothers Radio Station*, 309 U.S. 470 (1940), and the possibility it might benefit by keeping RC out of Carrollton was purely adventitious; (3) The filing of a legitimate complaint is a use, not an abuse, of Commission process and a party may not be chastised for using lawful process unless its complaints are wanton and fabricated; [6] (4) Since Thorburn had no conceivable reason for making the statements during the June 20, 1968 telephone conversation concerning his alleged delaying motives in filing the petition to deny (ascribed to him by Hollis Johnson), his veracity should not be impugned and the most plausible conclusion is that each party told the truth as he saw it and the two versions of the conversation can be roughly reconciled; (5) Its petition to enlarge the issues was not an abuse of process because Faulkner acted as promptly as possible in filing that petition; and (6) The Judge's bias

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[3] The supplements were filed on various dates between October 1968 and November 1971, and raised additional character, ascertainment and financial issues; sought Section 1.65 issues against RC; and raised site availability issues against RC. The June 1970 supplement raised the Whitman site matter (see paras. 8–9, *infra*).

[4] Faulkner also filed a motion for waiver of Section 1.277(c) of the Rules, insofar as it limits a brief in support of exceptions to 50 pages in length. Subsequent to the oral argument herein, Faulkner filed a motion for leave to file a motion to correct transcript, together with the motion to correct transcript. No oppositions have been filed; these motions will, therefore, be granted. By Order (FCC 75M–265), released February 13, 1975, Faulkner's petition for leave to amend was granted under delegated authority. The amendment reflects that on December 27, 1974, the indictment of James H. Faulkner, Sr., President and 71.53 percent stockholder of Faulkner Radio, Inc., which had been returned on May 8, 1973, by the United States District Court for the Eastern District of Louisiana, was dismissed.

[5] Faulkner's other Carrollton station, not involved here, is WBTR-FM, which is programmed separately.

[6] Citing *Tuna Broadcasting Co.*, 33 FCC 2d 1143, 1148 (Rev. Bd. 1972); *SIVCL and Broadcasting Services, Inc.*, 28 FCC 2d 71 (1971); *Southern Broadcasting Co.*, 31 FCC 2d 790 (1971); and *Wayne County Broadcasting Corp.*, 26 FCC 2d 52 (1970).

against a petitioner in Faulkner's position results in the proposition that a petitioner who fails to perfect his proof risks denial of renewal on the theory of abuse of Commission process, which will have a chilling effect on future petitions to deny by existing licensees.

7. The threshold issue here is whether the Judge's findings suffice to support his conclusion that Faulkner's petition to deny was filed to delay processing of RC's application (Issue 5). Faulkner's arguments under this issue are without merit. We first note Faulkner has not attempted to refute the Judge's finding that Thorburn was aware the Madden affair [7] had been settled several months before Faulkner filed its petition to deny. Absent a persuasive explanation to the contrary, we think Faulkner's attempt to revive the subject in its petition to deny circumstantially indicates Thorburn was attempting to create further enmity between the Johnsons and Madden for his own selfish purposes. Our own review of the record corroborates the Judge's finding that Thorburn's testimony on his role in this incident was evasive and contradictory. We think Thorburn's reliance on Tisinger's [8] word that Johnson's action was professionally unethical and Thorburn's subsequent discussion with Washington counsel did not convert his presentation of these character allegations to the Commission into an action in the public interest.

8. We also think Faulkner's arguments concerning the Whitman episode [9] are undercut by Thorburn's attempt to stir up Whitman against the Johnsons by misrepresenting the Johnsons' position to Whitman, his conflicting and evasive testimony at hearing, and his attempt to convey the false impression to the Commission that Whitman had been represented by counsel (Aubrey Gilbert) in the matter, when such was not the fact. Moreover, Faulkner's contention the Johnsons should have sought a different portion of the Whitman tract after learning the optioned land was unavailable is irrelevant. The undisputed evidence indicates only the four acres in question were under option, not the remainder. Additionally, the hearing record discloses that Whitman's affidavit (filed with Faulkner's June, 1970 supplement

[7] The character allegations against the Johnsons in Faulkner's petition to deny were predicated on an affidavit purportedly sworn to by Loyd Madden, a former client of Hollis Johnson, wherein Madden asserted Johnson fraudulently acquired a parcel of Madden's real estate in the course of their attorney-client relationship by coercing Madden into signing a blank deed with no one else present. Madden later went bankrupt and the trustee in bankruptcy filed suit against Johnson to recover the property for the benefit of creditors. However, the case was settled in January 1968, and Johnson received $800.00 in legal fees owed by Madden in exchange for the deed. In the designation order, para. 1, *supra*, we declined to specify an issue under the Madden allegations. However, insofar as these events bore on the "abuse of process" question (Issue 5), the Judge deemed (and we agree) such facts relevant to this proceeding.

[8] Thorburn first learned of Madden's bankruptcy from Robert Tisinger, attorney for the trustee in bankruptcy in the Madden case and a former one-third owner of station WLBB.

[9] In November 1967, Orin Whitman, who owned land in the area of RC's proposed transmitter site, granted the Johnsons a two-year option on a four-acre parcel. In April 1970, after an attorney (Aubrey Gilbert, see para. 32, *infra*) had checked the option to ensure it had expired, Whitman decided to put a trailer on the optioned parcel. But the record indicates that in May 1970, even though the written option had expired, Whitman on at least two occasions assured William Johnson the land was still available if and when RC's application was granted. The Judge found unrebutted evidence that such transactions are frequently conducted orally in small towns such as Carrollton. In May, 1970, Thorburn also told Whitman the Johnsons said they still had an option and were going to court over the matter. However, the record discloses no evidence the Johnsons ever told anyone they intended to sue Whitman. Thus, Thorburn's statement to Whitman, which apparently prompted Whitman to sign the purported affidavit prepared by Thorburn stating that the option was no longer in effect, had no factual basis.

to its petition to deny) was not a real affidavit." The purported affidavit was to the effect the option on the Whitman tract was no longer available. Thorburn prepared the affidavit and Whitman signed it. But Thorburn never informed Whitman the statement would be notarized Whitman was never sworn, and Thorburn admitted the document was "notarized" in his own office sometime after Whitman had signed it. Further, when asked at hearing why he had not mentioned in the document the fact that Whitman had told the Johnsons he intended to consult with his children before making a final decision regarding the availability of his land, Thorburn replied he did not think it sufficiently important. We agree with the Judge this omission could have mislead the Commission into believing the land was not available when, in fact, the matter had not been determined by Whitman.

9. Thorburn is an experienced broadcaster and notary public. The record discloses he had previously notarized false affidavits of performance for station WBTR–FM and had submitted affidavits in connection with the petition to deny in the Slidell, Louisiana proceeding (Docket No. 18413). Considering these facts, his statement at hearing that although he realized submitting an affidavit which is not a true affidavit constitutes misrepresentation, he only realized this for the first time (I.D. para. 64), is simply not believable. Rather, the only credible conclusion is that he knowingly and willfully submitted the false Whitman affidavit to the Commission. The gravity of this offense is not lessened by Faulkner's characterization of the affidavit as "imperfect" or Faulkner's action as mere "carelessness". Faulkner's argument that Thorburn's "lack of diligence" respecting this affidavit was no worse than RC's failure to report the loss of its original transmitter site,[11] is similarly without merit. The two actions involved simply are not comparable. Thorburn's conduct strongly suggests intent. The Johnsons' conduct does not.

10. In view of all the circumstantial evidence it adduced at hearing concerning the alleged undisclosed ownership agreement between Cohen and the Johnsons, we do not dispute Faulkner's assertion it had a reasonable basis for presenting this matter in its petition to enlarge the issues. But the record discloses that as early as 1968, Faulkner was aware of much of the evidence it adduced on this issue at hearing (I.D. para. 75). Accordingly, Faulkner should have heeded the Judge's admonition to the parties to make full prehearing disclosure of all the facts.[12] We think the uncorroborated affidavit of Sally Barton (Cohen's wife at the time of the incident she testified to) to the effect she had seen such an agreement provided at most only marginally suffi-

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[10] Under 47 C.F.R. 1.580(i), allegations of fact set out in petitions to deny, except for those of which official notice may be taken, ". . . shall . . . be supported by affidavit of a person or persons with personal knowledge thereof. . . ." We agree with the Judge that Thorburn was certainly aware of this provision, because (see para. 9, *infra*) he had previously filed a petition to deny and accompanying affidavits in the Slidell, Louisiana proceeding, as well as the petition to deny and supplements thereto in the instant proceeding.

[11] In January, 1971, RC filed an amendment to its application specifying a new transmitter site.

[12] Despite the Judge's admonition, all parties signified at the initial prehearing conference they did not intend to file any petitions to enlarge the issues. The Judge first struck all references to the Colon affair in Thorburn's testimony as being largely hearsay and beyond the scope of the designated issues. After Faulkner filed its petition to enlarge, he modified his ruling to hold such testimony could be considered to the extent it might bear on Thorburn's state of mind when he filed the petition to deny.

cient evidence to warrant Faulkner's request for a new issue after having stated at the prehearing conference it did not intend to file such a request. By waiting until late in the hearing to file its petition to enlarge, Faulkner undeniably obtained maximum benefit in prolonging this already protracted proceeding. In our view, this unwarranted delay in raising the Cohen matter must be weighed in considering the entire record.

11. We believe the preceding evidence circumstantially implicates Faulkner in abuse of Commission process. Additionally, there are other criteria under which Faulkner's arguments must be weighed. We think the Judge's comparison of a strike application to a petition to deny filed to delay or obstruct the grant of another application is apt. The Judge noted that in *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969), we stated: "Any licensee who is found to have participated in the filing of an application, *one of whose purposes* is the obstructing, impeding, or delaying of a grant of another application, places in jeopardy the authorization for the existing station which is the intended beneficiary of the strike application." [Emphasis supplied]. We also declared this policy would apply even if the obstructive intention was not the sole reason for such participation. Further, in *Grenco, Inc.*, 28 FCC 2d 166, 167 (1971), we set forth guidelines for determining an applicant's strike application motives. We said the following factors were significant: (1) the timing of the application, (2) economic and competitive benefits occurring from the application, (3) the good faith of the applicant, and (4) questions concerning a frequency study. But we also noted that "[t]he guidelines are just that, and each particular set of circumstances must be individually examined, since the matter of purpose or motive cannot be scientifically defined."

12. Faulkner's petition to deny was filed in June, 1968, some seven months after RC filed for 1330 kHz. We consider this timing significant under guideline (1), because the elapsed time indicates on its face a desire to maximize delay in processing RC's application. As to guideline (2), Faulkner clearly had a motive for blocking RC's application, since a petition to deny would at least delay—and perhaps prevent—RC's competitive new service in Carrollton, thereby obviously benefiting Faulkner economically. Guideline (4) is also relevant in light of the Thorburn-Holey correspondence.[13] The frequency search requested by Thorburn, even though never conducted by Holey, was not explained away at hearing by either one and indicates Thorburn's desire to delay RC's application.

13. Additionally, we conclude there is substantial doubt as to Faulkner's good faith (guideline 3) in light of all the circumstances disclosed at hearing. The record amply supports the Judge's finding that although the evidence does not establish Faulkner's petition was *per se* responsible for the lengthy delay in designating the applications for hearing, it is probable Faulkner's conduct, in light of all the facts adduced in this proceeding, contributed heavily to that delay

[13] On May 20, 1968, the day after RC's application was put on the "cut-off list", Thorburn wrote Faulkner's consulting radio engineer, W. J. Holey, inquiring whether Holey could find another location were the frequencies 1330 kHz and 1500 kHz would fit, as he felt the RC application might soon be withdrawn. Holey replied that "[t]he 1330 kc application for Carrollton was put on the cut-off list May 19th and will be free and clear June 19th, so I do not see that anything can stop it, or slow it down, now. . . ." (I.D. para. 23.)

and was meant to do so. As already made clear (see paras. 7–9, *supra*) we think the original petition to deny and the June 1970 supplement raising the Whitman matter were not filed on the basis of public interest motives, even assuming *arguendo* they had a reasonable basis in fact. Hence, the only reasonable inference on this record is that they were filed for purposes of delay or obstruction. Whether the remaining seven supplements were filed with the same purpose is less clear,[14] although they undeniably contributed to delay.

14. Moreover, we think certain crucial circumstantial evidence bears heavily on the delay issue and is overwhelmingly persuasive that Faulkner lacked good faith in filing its petition. (1) The Thorburn-Holey correspondence of May, 1968 indicates that Thorburn was then in fact contemplating a strike application. The fact he never filed such application is immaterial, for, as the Judge determined, such contemplation would indicate Thorburn's state of mind at the time as bent on delaying RC's application. (2) Also in May, 1968, Thorburn misrepresented to Whitman the supposed legal action the Johnsons contemplated respecting the antenna site, thereby securing Whitman's written statement adverse to the Johnsons. But, the evidence shows, Whitman had not then actually declared the site unavailable. (3) The next month, Faulkner filed its petition to deny. Based on Thorburn's experience in filing a similar petition in the Slidell proceeding, raising identical types of issues (*i.e.*, ascertainment of needs, financial and character) as those in the Carrollton petition, Faulkner knew or should have known the petition would probably delay RC's application considerably. And, as already mentioned, the character allegations of the petition centered about the Madden dispute, which Thorburn knew or should have known had already been settled. (4) Hollis Johnson's version of the crucial June 20, 1968 telephone conversation (see para. 17, *infra*) attributed to Thorburn, *inter alia*, an account of Faulkner's financial difficulties and the unprofitability of radio ventures, and the statement that the petition to deny had been filed to obtain four or five months' delay. (5) Thorburn then sought to obtain a non-competition covenant from Cohen, then a key employee of Faulkner in Carrollton. This action plainly was designed to prevent RC from obtaining experienced staff in Carrollton should it receive a grant. (6) And finally, Thorburn apparently encouraged Madden to file a complaint against Hollis Johnson with the local bar grievance committee on which, as Faulkner itself points out, the committee advised Madden and the Commission it lacked authority to act. The committee further informed Madden if he wanted to pursue the matter he should contact either the county grand jury or the Georgia State Bar. The presumed lack of any merit to Madden's grievance is indicated by the fact there is no evidence Madden ever did so.

15. In light of our analysis under *Grenco*, Faulkner's argument it merely had a legitimate interest in the kind of competition it might face and any benefit it obtained by keeping RC out of Carrollton was

[14] Our examination of these documents indicates that five of the seven supplements were, as Faulkner asserts, directed to various amendments to RC's application, and the other two supplements, which deal with an alleged Rule 1.65 violation by RC, do not on their faces constitute an abuse of Commission process. Moreover, as the Judge noted, RC also filed numerous amendments to its application prior to the designation of the applications for hearing.

purely adventitious, are totally without merit. Rather, the evidence clearly demonstrates Faulkner did file a strike petition. Plainly, one of Faulkner's purposes was to obstruct, impede and delay the grant of RC's application. It is unnecessary to find this was Faulkner's sole—or even primary—purpose in order (by analogy to the *Asheboro* strike application policy, para. 11, *supra*) to put its license in jeopardy. Hence, we find Faulkner's arguments unpersuasive and we conclude its petition was not filed for legitimate public interest purposes.

16. There remain other and more dispositive issues which confirm the correctness of the Judge's conclusion that Faulkner's license should not be renewed. Those issues are: (1) whether Faulkner or RC made misrepresentations in their affidavits concerning the June 20, 1968 telephone conversation (Issue 6); (2) whether RC misrepresented to the Commission the availability of the Whitman tract as an antenna site (Issue 4); and (3) whether Cohen ever had an ownership interest in RC and, if so, whether the Johnsons lacked candor concerning this interest (the issue added by the Review Board).[15]

17. The record taken as a whole indicates the Judge did not err in finding Thorburn's testimony concerning the June 20, 1968 telephone conversation was inconsistent, vacillating, contrived and insincere; that Hollis Johnson's testimony on this matter was truthful; and in concluding Hollis Johnson should be believed over Thorburn. The Judge's determination was based on the evidence of record and his observation of the witnesses' demeanor. Absent abuse of discretion by the Judge or the existence of facts bearing on character disqualification of the witnesses which make unnecessary reliance by the Judge upon the witnesses' demeanor, we will not, as urged by Faulkner, substitute our judgment concerning the credibility of the witnesses for that of the trier of fact. *Cf., Carbon Emery Broadcasting Co.*, 22 FCC 584, 586 (1957). Accordingly, we sustain the Judge's resolution of Issue 6 against Faulkner.

18. As to the Whitman tract episode, the record evidence fully supports the Judge's findings and conclusions on this matter. We accordingly conclude that RC did not misrepresent the facts regarding the Whitman tract; that the parties had informally agreed to keep the option open indefinitely even after its written terms had expired; that the Johnsons did not unequivocally know Whitman had changed his mind until they were informed of Whitman's purported affidavit; and that the record indicates the Johnsons' testimony on this matter was candid, credible and corroborated by, among others, Whitman himself. On the other hand, the record indicates Thorburn misrepresented facts and lacked candor by fraudulent and knowing submission of the false affidavit, and by his evasive and misleading testimony at hearing concerning his role in the matter. Here again, we believe the Judge's determination as to the credibility of the witnesses should not, absent some indication of abuse of discretion, be disturbed. The record

[15] Faulkner does not dispute the Judge's resolution of the community ascertainment issue (Issue 1) favorable to RC and that matter is not before us. As set forth in our rulings on exceptions, we agree with the Judge's resolution of Issues 2 and 3 favorable to RC. With respect to the latter issue, he deemed RC's Rule 1.65 violation of no decisional significance in light of the fact the Commission had been put on notice by the purported Whitman affidavit filed by Faulkner, and especially in view of Thorburn's misrepresentation of the Johnson's position to Whitman which seemingly resulted in Thorburn's obtaining the purported affidavit adverse to the Johnsons.

evidence indicates Thorburn in his affidavit and testimony was either reckless with the truth or willfully misrepresented facts. We therefore resolve Issue (4) in favor of the Johnsons and against Faulkner.

19. Faulkner offered no persuasive proof on the existence of any alleged Cohen-Johnson ownership agreement, either actual or contemplated, written or oral. This is so whether or not we accept Faulkner's hypothesis that Cohen believed he had such an understanding with Hollis Johnson for future employment with RC and part ownership therein. The record clearly indicates Cohen never had, and does not now have, any ownership interest in RC. Accordingly, the Johnsons did not lack candor concerning their interests in RC. Our examination of the record indicates the testimony of Faulkner's witnesses on this matter was confusing, contradictory and uncorroborated hearsay. Accordingly, no conclusions adverse to RC are warranted under the undisclosed ownership issue.

20. Finally, Faulkner argues the Judge displayed bias against a petitioner in Faulkner's position. We think this argument is also without merit. As we read the Initial Decision, the Judge protests *unwarranted* delay in processing an application, such as that caused by a frivolous or unsubstantiated petition to deny or to enlarge issues, or an *unnecessarily* protracted hearing. Further, the Judge rightly concerned himself here with the element of delay because he was required under designated Issue 5 to consider the matter of "delay". Moreover, we see no bias in the Judge's statement that a "private attorney general" who is also a potential business competitor assumes a particularly difficult burden respecting truthfulness and accuracy in bringing charges against his potential adversary. Certainly, a "private attorney general" who oversteps his role by making misrepresentations and abusing the Commission's processes to thwart new competition does not act in the public interest.

21. Nor does the Initial Decision stand for the general proposition, as Faulkner argues, that a complainant who is also a party in interest must perfect his proof (even though he is not assigned the burden of proof on his charges) at peril of having his license renewal denied for abuse of Commission process. Rather, we believe, the Judge asserts the proposition that a party who supports his allegations against his potential competitor with so little evidence that it is apparent he had no lawful basis for filing his complaints has committed abuse of process and must be judged accordingly. In short, this proceeding rests on its particular facts, which convincingly demonstrate Faulkner was more interested in fending off competition in Carrollton than in bringing public interest information to the Commission's attention.

22. Similarly unpersuasive is Faulkner's contention that the Initial Decision contains "many details" which, though accurate, give the net effect of portraying calculated misdoing on Faulkner's part when taken out of context. The only two examples Faulkner provides [16] con-

[16] Faulkner cites the Judge's statement that Faulkner first indicated it would call Aubrey Gilbert as a witness and later indicated it would not (I.D. n. 26, para. 68). Faulkner claims there is a clear suggestion it was somehow withholding vital evidence by not producing Gilbert. Faulkner submits that in fact, Gilbert appeared at hearing as counsel for direct examination of Whitman, but no other party requested he take the stand. Faulkner further cites as erroneous and unfair the Judge's statement (I.D. para. 36) that Ms. Vaughn's testimony appeared to conflict with Thorburn's version of the June 20, 1968 telephone conversation, especially since Ms. Vaughn (Johnson's secretary) heard only Johnson's part of the conversation.

vey no such impression. As for Faulkner's first example, the Judge also stated that although Gilbert entered an appearance as counsel on behalf of Faulkner, Faulkner indicated at hearing that it would not call Gilbert as a witness despite its expressed intent in an earlier letter to do so. We think this observation involves nothing more than a recital of the facts and in no way implies Faulkner was withholding "vital evidence". Faulkner's second argument overlooks the fact the Judge also declared that although Ms. Vaughn's testimony was of limited value, it nonetheless helped to corroborate Johnson's testimony.[17]

23. The Commission and the Courts have consistently held that false statements, misrepresentations or lack of candor by applicants or licensees in the course of Commission proceedings raise substantial questions of basic character qualification. See, *e.g.*, *Milton Broadcasting Co.*, 34 FCC 2d 1036 (1972); *Nick J. Chaconas*, 28 FCC 2d 231 (1971), *recons. den.*, 35 FCC 2d 698 (1972), *aff'd.*, 486 F. 2d 1314 (C.A.D.C. 1973); *WMOZ, Inc.*, 36 FCC 202 (1964); *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). We agree with the Judge that we cannot condone deception, even "useless deception", by licensees, especially experienced broadcasters, and that the fact of concealment by a licensee or applicant is more significant than even the facts concealed. *FCC v. WOKO, Inc.*, *supra*, at 227. Faulkner placed its license in jeopardy by filing a strike petition to deny. It also displayed lack of candor and committed knowing and willful misrepresentation by both the testimony of Thorburn at hearing and by his seeking to deceive the Commission through submission of an affidavit that was in no sense a real affidavit. In view of the nature and degree of Thorburn's misconduct, we conclude that Faulkner does not possess the requisite character qualifications of a Commission licensee, and that the public interest would not be served by a renewal of Faulkner's license. We further conclude that the record in this proceeding demonstrates that Radio Carrollton possesses the requisite qualifications to be a Commission licensee, and that the public interest would be served by a grant of its application.

24. Accordingly, IT IS ORDERED:

(a) That the motion for waiver of Section 1.277(c) of the Commission's Rules, filed May 31, 1974, by Faulkner Radio, Inc., IS GRANTED, and its brief in support of exceptions, filed May 29, 1974, IS ACCEPTED; and

(b) That the motion for leave to file "motion to correct transcript", and motion to correct transcript, both filed December 20, 1974, by Faulkner Radio, Inc., ARE GRANTED;

25. IT IS FURTHER ORDERED That the above-captioned application (File No. BR-1431) of Faulkner Radio, Inc., for renewal of license of standard broadcast station WLBB, Carrollton, Georgia, IS DENIED;

26. IT IS FURTHER ORDERED That Faulkner Radio, Inc. IS AUTHORIZED to continue to operate the station until 12:01 a.m.,

[17] Thus, the Judge observed, she testified Johnson had expressed his appreciation to Thorburn for his having the decency to appologize for the attack on Johnson's character. Such a statement by Johnson is obviously one that she would overhear in listening to Johnson's part of the conversation.

August 1, 1975, to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks judicial review of our Decision, it is authorized to continue to operate station WLBB until thirty (30) days after the final disposition of such appeal; and

27. IT IS FURTHER ORDERED That the above-captioned application (File No. BP-17970) of William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton, for construction permit for a new standard broadcast station at Carrollton, Georgia, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

RULINGS ON THE EXCEPTIONS OF FAULKNER RADIO, INC.

Exception No.	*Ruling*
1	Denied. The Judge's finding is of no decisional significance. See par. 13 and n. 13 of this Decision. However, Faulkner's supplement of Oct. 10, 1968, was directed to an amendment filed by RC on Sept. 18, 1968, not Oct. 10, 1968, as Faulkner states.
2	Denied. The requested findings are of no decisional significance. See ruling on exception 1. However, the 6 months' delay in the processing of RC's application to which Faulkner alludes resulted from the nonavailability of RC's original antenna site due to Thorburn's misconduct. See par. 8 and n. 8 of this Decision.
3	Denied. For the reasons set forth in this Decision, the Judge's finding is correct. As Faulkner argues, the abuse of process issue, by its wording, resulted from the original petition to deny. However, the reason for the delay in designation for hearing is not unexplained. Rather, it is attributable to the petition to deny, the supplements thereto and RC's numerous amendments to its application, as well as the requests of both parties for extension of time for filing various pleadings and requests to withhold action on the applications, noted by Faulkner in exception 2.
4	Denied. The disputed finding, which in fact reads: ". . . the evidence was persuasive that the Johnsons, and no one else, have been, and remain, the only parties in interest to the Radio Carrollton application" correctly reflects the record evidence.
5, 9, 16	Denied. The findings are of no decisional significance.
6	Denied. The record evidence does not support the requested finding. Although the evidence reflects that Hollis Johnson and Thorburn had been social friends, played golf together and were fellow Rotarians, it does not reflect that it was in light of this past relationship that Thorburn stated he called Johnson.
7	Denied. See par. 17 of this Decision.
8	Denied. The record evidence does not support the requested finding.
10, 42	Denied. The Judge's finding is adequately supported by the record evidence.
11	Denied. See ruling on exception 7. Moreover, the requested finding is of no decisional significance in light of this Decision.

12	Denied. The Judge's finding correctly reflects the record evidence as bearing on Thorburn's state of mind at the time in question. This is so despite the fact that there is no probative record evidence that Thorburn ever expressly asked Holey whether the RC application could be obstructed, and no "strike" application against RC was ever filed.
13	Denied. The Judge's finding is adequately supported by the record evidence, and the requested finding is of no decisional significance.
14	Denied. See par. 18 of this Decision. Moreover, in denying Faulkner's application for mitigation of forfeiture in the prior fraudulent billing matter, the Commission stated: "In order to affirm the forfeiture, it is not necessary to find that the principals of the licensee [Faulkner] had direct knowledge of the fact that false affidavits were issued. . . . Licensee does not deny that affidavits containing inaccurate statements were issued. . . ." FCC 70-662, released June 26, 1970 (RC exhibit 16).
15	Denied. The Judge's finding is adequately supported by the record evidence and the requested finding is not. See ruling on exception 3.
17	Denied. See par. 7 of this Decision.
18, 19, 31, 33	Denied. The requested findings are of no decisional significance in light of this Decision.
20	Denied. The Judge's finding is adequately supported by the record evidence, in light of the fact that the Johnsons' balance sheets in evidence clearly show more than sufficient assets to finance the proposed station (I.D. pars. 51-52).
21, 34, 35, 36, 37, 38, 43.	Denied. The requested findings are not of decisional significance in view of this Decision, and the Judge is not required to make findings on every conceivable point on which evidence is offered.
22	Denied. The Judge's finding is adequately supported by the record evidence. See also par. 8 of this Decision.
23	Granted. The requested finding correctly reflects the record but is of no decisional significance. The applicable paragraph of the Initial Decision, read in its entirety, clearly indicates that the Judge's insertion of the word "not" in Thorburn's reply to the Judge's question was inadvertent and in no way reflects any misunderstanding by the Judge as to Thorburn's position on this matter.
24	Denied. The record evidence amply supports the Judge's finding.
25	Denied. Whitman testified that Gilbert was not, and had never been, his attorney. Assuming, *arguendo*, that Gilbert did assist Whitman in determining that the option had expired, that fact without more did not thereby make Gilbert Whitman's attorney in the land tract matter.
26	Denied. See par. 22 of this Decision.
27	Denied. See par. 18 of this Decision.
28	Denied. The Judge's "finding" is dictum and of no decisional significance. Moreover, the exception does not accurately state the disputed portion of the Initial Decision, which in fact merely reflects the Judge's belief that, had the Review Board been forewarned, it would not have added such an issue.
29	Denied. The Judge's finding is adequately supported by the record evidence. The requested finding does not give evidence of a full and adequate prehearing disclosure of the Cohen matter by Faulkner. See par. 10 of this Decision.
30	Denied. The Judge's finding is adequately supported by the record evidence. See par. 14 of this Decision.

32	Granted in part and denied in part. To the extent indicated in this Decision, the exception is granted but is denied in all other respects as without decisional significance in view of this Decision (1st clause of the exception) and because the Judge's finding is adequately supported by the record evidence (2nd clause of the exception).
39	Granted in view of the Judge's correct previous finding to this effect (I.D. par. 6).
40, 41, 44	Denied. The Judge's findings are adequately supported by the record evidence, and the requested finding is of no decisional significance in view of this Decision.
45	Denied. The Judge's finding more accurately reflects the record evidence.
46	Denied. The Judge's conclusion is correct and is supported by the weight of the evidence. See pars. 7–15 of this Decision.
47, 48, 49, 50	Denied. As this Decision makes clear, the Judge's conclusions adequately and correctly reflect the record evidence.
51	Denied. The Judge's conclusion is adequately supported by the record evidence. The requested conclusion is of no decisional significance (1st par.) and contrary to the record evidence (2d par.) in light of our ruling on exception 20.
52	Denied. The Judge's conclusion is adequately supported by the record evidence. See pars. 8 and 18 of this Decision, which deal with this matter. We note, parenthetically, that this exception should be addressed to par. 117, not par. 116, of the Initial Decision.
53	Denied. As this Decision makes clear, the Judge's conclusions are amply supported by the record evidence. Moreover, the requested conclusion is of no decisional significance in view of this Decision.
54	Denied. The Judge's conclusion is amply supported by the record evidence. See pars. 8 and 18 of this Decision.
55	Denied. The Judge's conclusions are amply supported by the record evidence. In light of our discussion of this matter at par. 23 of this Decision, we find no merit to Faulkner's argument that the submission of Whitman's "affidavit" is not as serious a matter as that in *3 J's Broadcasting Co.*, 41 FCC 2d 664 (Rev. Bd. 1973). We note, parenthetically, that this exception should be addressed to par. 121, not par. 120, of the Initial Decision.
56	Denied. As this Decision makes clear, the Judge's conclusions are adequately supported by the record evidence. See ruling on exception 25 in regard to Faulkner's denial that Thorburn tried to convey a false impression that Whitman had been represented by an attorney in the land tract matter.
57	Denied for the reasons contained in this Decision. The Judge's conclusion is amply supported by the record evidence and the requested conclusion is not.
58	Denied. See rulings on exceptions 53 and 55.
59	Denied. The Judge's ultimate order is correct and is overwhelmingly supported by the weight of the evidence. Faulkner's requested conclusion is not supported by the record evidence.
60, 61, 62, 69, 71	Denied. The rulings are substantially accurate and contain no basis for reversible error. None of the rulings prevented Faulkner from introducing relevant and material evidence. On the basis of the overall record, the hearing was fairly conducted and the evidence sustains the Judge's rulings.
63, 65, 66	Denied. The Judge's statements contain no basis for reversible error inasmuch as the evidence demonstrates that Faulkner did file a "strike" petition and in view of Faulkner's culpability demonstrated by the overall record in this proceeding.

64	Denied. The Judge's statement was of no material significance in the context of the entire colloquy. Moreover, as this Decision makes clear, it is amply supported by the record evidence.
67	Denied. The Judge was not precluded from propounding relevant and material questions to witnesses. Rule 1.243 (c) expressly authorizes such examination.
68	Denied. See ruling on exceptions 60, 61, 62, 69, and 71. We note, parenthetically, that Faulkner's citation to the transcript (Tr. 751) is incorrect.
70	Denied. The Judge's characterization of Mrs. McGhee's testimony is adequately supported by the record evidence.
72	Denied. The Review Board's refusal to add the requested meritorious programing issue was correct for the reason given in its Memorandum Opinion and Order, 40 FCC 2d 92 (1973).

APPENDIX I

FCC 74D-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON D.B.A. RADIO CARROLLTON, CARROLLTON, GA. For Construction Permit	Docket No. 19636 File No. BP-17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. For Renewal of License	Docket No. 19637 File No. BR-1431

APPEARANCES

On behalf of William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton. Messrs. *Samuel Miller* and *Mark E. Fields* (Miller & Fields, Washington, D.C.); on behalf of Faulkner Radio, Inc. (WLBB). Messrs. *Marvin Rosenberg. Edward W. Hummers. Jr.*, and *Frank U. Fletcher* (Fletcher, Heald, Rowell, Kenehan and Hildreth, Washington, D.C.) and Mr. *Aubrey W. Gilbert* of Carrollton, Georgia; and on behalf of the Chief of the Broadcast Bureau of the Federal Communications Commission, Mr. *Walter C. Miller.*

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE DAVID I. KRAUSHAAR

(Issued April 10, 1974; Released April 15, 1974)

PRELIMINARY STATEMENT

1. Radio Carrollton, a partnership consisting of William P. Johnson and Hollis B. Johnson, seeks a permit to construct and operate a new standard broadcast station at Carrollton, Georgia on the frequency 1330 kHz with 500 watts power, daytime only. Faulkner Radio, Inc. applies herein for renewal of the station license for Station WLBB, Carrollton, Georgia, which presently operates with 1 kilowatt power, daytime only on the frequency 1100 kHz. The two applications, specifying different frequencies, are *not* mutually exclusive in that from an electronic viewpoint both could have been granted. However, as will be explained in greater detail later, Faulkner Radio filed a petition ("Petition to Deny") requesting that Radio Carrollton's application either be denied or designated for hearing on the basis of so-called ascertainment-of-needs, financial qualifications, and character issues. The allegations of this Petition were later supplemented and added to and the Commission thus had a number of pleadings to consider or to pass upon. Since, with only such pleadings before it, it was unable to make the requisite statutory finding that it would be in the public interest, convenience and necessity to grant either application, the Commission has consolidated the applications in the present proceeding and designated them for hearing on seven specified issues.

It did so in a 9-page Memorandum Opinion and Order adopted November 15 and released on November 21, 1972 (38 FCC 2d 68). The issues as framed by the Commission are:

1. To determine the efforts made by Radio Carrollton to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

2. To determine with respect to the application of Radio Carrollton:

(a) Whether the commitments by the Commercial Bank, West Georgia National Bank, and Peoples Bank are still available to the applicant;

(b) Whether the partners possess adequate current assets to finance the proposed station; and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

3. To determine whether Radio Carrollton has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of substantial and significant changes as required by Section 1.65, and, if not, the effect of such noncompliance on its basic qualifications to be a Commission licensee.

4. To determine whether Radio Carrollton misrepresented itself to the Commission pertaining to the availability of the land owned O. S. Whitman as an antenna site, and, if so, what effect such conduct has on the basic qualifications of Radio Carrollton to be a Commission licensee.

5. To determine whether Faulkner Radio, Inc., filed its Petition to Deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee.

6. To determine whether Faulkner Radio, Inc., or Radio Carrollton misrepresented itself to the Commission in its affidavit submitted concerning the conversation between Robert M. Thorburn [1] and Hollis B. Johnson, and, if so, what effect such conduct has on the basic qualifications of either applicant to be a Commission licensee.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the Radio Carrollton application and/or renewal of the Faulkner license would serve the public interest, convenience, and necessity.

2. A prehearing conference was held in this proceeding on December 21, 1972 and a further conference was held on February 23, 1973. Hearing sessions were held in Atlanta, Georgia on May 14–16, 1973. On June 27, 1973, Faulkner filed a petition to enlarge the issues against Radio Carrollton, in which it asked for a hidden, or undisclosed, ownership issue on the basis that one Al Cohen, a former employee of Faulkner allegedly had an ownership interest in Radio Carrollton that was not disclosed to the Commission. A further hearing conference was

[1] Evidently, the Commission's Order initiating this proceeding, at paragraph 14 and in Issue 6, misspelt "Robert Thornburn." The correct spelling is "Robert Thorburn."

thereupon convened in Washington, D.C., on July 5, 1973, during which, among other things, it was determined that the record should remain in open status pending Review Board action on the latest Faulkner petition. Four months after it was filed, the Review Board, by Memorandum Opinion and Order released on October 23, 1973 (43 FCC 2d 472), granted the Faulkner petition to enlarge by adding the following new issue:

> To determine whether Al Cohen has and/or had a one-third ownership interest in Radio Carrollton, and whether William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton, have been lacking in candor with the Commission concerning this interest, and, if so, to determine the effect thereof upon the applicant's qualifications to be a Commission licensee.

3. By Order released on October 26, 1973 (FCC 73M-1228), the Presiding Judge directed the parties to submit briefs on the question of his authority to issue a partial initial decision herein predicated upon the record developed under the issues framed by the Commission in the order initiating this proceeding and on the advisability of such a procedure, and scheduled a further prehearing conference for November 9, 1973. In view of the negative attitude of the parties on the matter of the issuance of a partial initial decision the Presiding Judge decided not to proceed further with this proposal. The scheduled further prehearing conference was held November 9, 1973 and further hearings limited to the issue added recently by the Commission's Review Board were duly convened on January 15, 1974 at the Commission's offices, Washington, D.C. Sessions were held January 15 through 18, 1974 and the record was finally closed on the latter date. Proposed findings of fact and conclusions of law on the record developed under the original issues were filed by all parties by a deadline set earlier, *i.e.*, by September 18, 1973. Reply briefs were filed by October 9, 1973 by Faulkner Radio and the Commission's staff (Broadcast Bureau). Supplemental proposed findings of fact and conclusions of law in regard to the issue added by the Review Board were filed by March 25, 1974 and replies thereto have been filed by the Broadcast Bureau and Faulkner Radio by April 5, 1974. All interlocutory matters having been finally disposed of, an Initial Decision may now issue.

FINDINGS OF FACT

Background

4. In framing issues 5 and 6, *supra*, which raise questions for determination herein regarding the impact of certain matters upon the Commission's hearing processes, the Commission commented (38 FCC 2d 68, at 73, para. 14):

> In its opposition to Faulkner's Petition to Deny, filed July 25, 1968, Hollis B. Johnson deposed that Robert M. Thorburn, Vice-President of Faulkner Radio, Inc., contacted him by telephone and discussed the Radio Carrollton application. He swears Thorburn told him that he "[found] it necessary to object to the application" for purposes of delaying the grant of the construction permit because they were experiencing "money problems". The character issue was made only because he (Thorburn) was "grasping at straws." . . . Thorburn deposed in rebuttal that a conversation did take place in the manner and at the time claimed by the applicant. He swears, however, that Johnson misrepresents the substance

of the conversation. "Mr. Johnson's affidavit attributes statements to me which I did not make and misconstrues those statements which I did make to him". *Since the sworn statements are clearly in conflict and no other information is available, a substantial question of fact exists which must be explored in hearing. . . .* (Emphasis in italic added.)

It is noticed here that Mr. Thorburn, cited in the above quotation, has been Faulkner's Vice-President and the General Manager of its Carrollton, Georgia stations and that he has been engaged in broadcasting for 14 years. Prior to that he had majored in broadcasting in college. All of his employment, except for 6 or 7 months, was with Faulkner.

5. During the course of the initial prehearing conference in this proceeding, the Presiding Judge explicitly advised that because of the conflicting affidavits of Messrs. Thorburn and Hollis Johnson ". . . demeanor may be an important factor" in resolving the conflict. At the same time, however, he urged the parties to cast as much of their respective direct cases as feasible into written form, that full and adequate disclosures of all relevant facts in advance of the hearing be made, and that each applicant try to help break the deadlock that caused the Commission to include issues 5 and 6. The Presiding Judge also adverted to the probability that it would be difficult for the parties to reconstruct a telephone conversation that occurred several years before and declared that "it is pretty obvious to me that . . . circumstantial evidence . . . might have to be resorted to . . ." (T. 35, 36). It may be noted, as part of the background, that, notwithstanding these admonitions regarding difficulties of proof that would be likely to be encountered in this case, none of the parties had seen fit to make use of available discovery procedure, pursuant to the Commission's rules, and that all parties signified, during the initial prehearing conference, that they had no intention to file any petitions for enlargement of the issues.[2]

6. In order to set the delays that have occurred in this proceeding into perspective, for evaluation of the evidence adduced under issues 5 and 6, something should be said about the chronology of events leading to the designation of these applications for hearing. Consequently, it is here observed that the *Radio Carrollton application was filed November 29, 1967* and that it had been on file for very nearly 5 years before the Commission finally set it for hearing; that on June 18, 1968, some 7 months after Radio Carrollton's application was filed, Faulkner had filed its Petition to Deny, *supra*; that on October 10, 1968, Faulkner filed a "Supplement" to its Petition that raised what amounted to additional arguments on matters previously alleged; that on January 3, 1969, Faulkner filed a further "Supplement", this time raising additional allegations in regard to its contentions as to the character qualifications of Radio Carrollton's principals and requesting a so-called failure to report pursuant to Rule 1.65 issue against Radio Carrollton; that on January 6, 1969, Faulkner filed still another "Supplement"; and that additional "Supplements" were filed by Faulkner on July 16, 1969 (raising additional arguments as to Radio Carrollton's ascertainment-of-needs survey), on June 23, 1970 (raising for the first time a site availability question against Radio

[2] But see paragraph 2. Extensive utilization of pre-trial discovery was initiated and undertaken, however, in regard to the issue the Review Board added at the specific instance and request of Faulkner Radio.

Carrollton and a so-called Rule 1.65 failure-to-update issue and a misrepresentation issue), on April 28, 1971 (attacking Radio Carrollton's amended transmitter site location), on September 2, 1971 (raising additional argument regarding the availability of the amended transmitter site proposed by Radio Carrollton), and on November 19, 1971 (raising still further character and financial allegations against Radio Carrollton). All eight of the "Supplements" to Faulkner's Petition to Deny naturally elicited replies by Faulkner to oppositions filed by Radio Carrollton.[3]

7. The Johnsons (see the caption), who happen to be unrelated, are law partners with offices in Carrollton, Georgia. Each Johnson is also a 50% partner in the applicant, Radio Carrollton. The evidence shows that Mr. William P. Johnson, in particular, has been a member of the State of Georgia Bar since the year 1957 and that he is an attorney of some local pre-eminence who has represented insurance companies, a utility, and Georgia counties, and that he is a member of bar associations including the American Bar Association. Mr. Hollis B. Johnson, William Johnson's partner, has also been a respected member of the Georgia Bar since 1964. The idea of filing for a radio station in Carrollton, Georgia originated with him and, indeed, the responsibility of preparing the application of Radio Carrollton fell to him and it was he who undertook to forward it to Washington, D.C. Communications Counsel for filing with the Federal Communications Commission. Notwithstanding unwarranted, and unsupported, attacks on the Johnsons to the contrary (see *infra*), the evidence was persuasive that the Johnsons, and no one else, have been, and remain, the only parties in interest to the Radio Carrollton application.

Issues 5 and 6 (Abuse of Process, Etc.)

8. A common practice in Commission decisions to consider the facts developed under each issue in the sequence that the issues are set out in the Commission's Order designating applications for hearing will be departed from herein. For issues 5 and 6, *supra*, which implicate Faulkner in abuses of the Commission's hearing processes, and both applicants in possible serious misrepresentations, go to the heart of any inquiry into the qualifications of broadcast applicants or licensees to be licensees, or to continue as licensees, and obviously take substantive precedence over such relatively less significant matters as Radio Carrollton's efforts to ascertain community needs and interests (issue 1) or its compliance with rule 1.65 (issue 3).[4]

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[3] In addition to the so-called Supplements, it is noted that applicant Radio Carrollton has filed numerous amendments to its application while the latter was on the Commission's processing line, i.e., prior to designation for hearing. While it is true, therefore, as Faulkner Radio urges (Faulkner Radio's "Reply Proposed Findings of Fact", para. 17), that the background data set out in the text does not establish *per se* that Faulkner's Petition to Deny was responsible for the lengthy delay in the Commission's designation of the applications for hearing, it is nevertheless probable that Faulkner's conduct contributed heavily to such result, and was meant to do so. In any event, it is incumbent on the triers of the facts to weigh this background information along with all the other factual data adduced during the hearing in order to reach a reasonable interpretation. There is a point at which fact finders have to fall back on circumstantial evidence, where the resolution of controversies do not yield to more direct proof, and perhaps that is what must be done in the present situation.

[4] The evidence adduced under designated issues 3 and 4, relating to Radio Carrollton's specification of a transmitter site, also has a bearing upon the parties' candor in this proceeding. Actually, though it is perhaps useful to dichotomize the facts according to the issues, *all* the facts, and the inferences therefrom, are to be considered together to the extent that they have proved to be interrelated.

9. As noted (para. 4), issues 5 and 6 were included due to obviously conflicting sworn statements made by Messrs. Hollis B. Johnson of Radio Carrollton and Robert Thorburn of Faulkner Radio as regards a telephone conversation they had had on June 20, 1968, some five years ago. These gentlemen presented their affidavits in evidence, thereby signifying their intentions to be bound by what they had previously submitted.

10. Mr. Hollis B. Johnson, in a sworn statement, signed by him on June 26, 1968, set forth his version of the June 20, 1968 telephone conversation as follows:

> . . . Hollis B. Johnson . . . was contacted on the telephone by Robert M. Thorburn . . . on Thursday morning, June 20, 1968, wherein Mr. Thorburn called to appraise me of his "finding it necessary to object to the application" of . . . Radio Carrollton for purposes of delaying the granting of a construction permit for [Radio Carrollton's proposal] on the frequency of 1330 kilohertz . . .
>
> Mr. Thorburn apologized to me for his having attacked my character qualifications and indirectly the character qualifications of my partner, William P. Johnson. He stated that the objection was made on the character issue only because he was "grasping at straws" and this was the only thing he could find that might cause a delay for his benefit."
>
> Mr. Thorburn stated that "there was no way he could prevent the license from being granted but for personal reasons he needed a delay in Radio Carrollton's application for four or five months". Mr. Thorburn further stated that "had he known his attorneys would have found other minor discrepancies in the application he would not have pursued or dared to use the character qualification matter at all". He was very apologetic to me for having taken this route "but that he must have a delay as to our application". One of the reasons he stated that WLBB and Faulkner Radio, Inc. were having financial difficulties as a result of their rapid expansion to Slidell, Louisiana and Auburn-Opelika, Alabama, along with various and sundry other difficulties. He stated that "WLBB was presently supporting the other stations owned by Faulkner Radio, Inc. and that he had had money problems".
>
> This telephone call was voluntarily incited by Mr. Thorburn at no instance of myself or William P. Johnson as we have at no time, since the filing of the application for Radio Carrollton, instigated any contact with Mr. Thorburn.

11. Mr. Robert Thorburn's sworn statement (signed in August of 1968) sets forth his version as follows:

> I have read the Affidavit of Hollis B. Johnson . . . which relates to a telephone conversation of June 20, 1968, between Hollis B. Johnson and myself. Mr. Johnson's Affidavit attributes statements to me which I did not make and misconstrues statements which I did make to him . . . Since Hollis Johnson called me at the time he filed his application, I thought that, as a matter of courtesy, I would call him and advise him of the filing of the Petition to Deny . . . Hollis Johnson stated that he was sorry that his character had been brought into it, to which I responded that I was sorry that it was necessary to do so. However, my statement was never intended to indicate that there was not any basis for the filing of the petition. I believe that the matters stated in the petition are necessary for the Commission to consider in passing upon the application. Hollis Johnson stated his application probably would not be granted as a result of the filing of the petition. I replied that it might only be delayed four or five months. This was my only reference to time and was intended only to indicate that the Commission could grant the application if it determined that the matters presented could be resolved in Radio Carrollton's favor.
>
> I also told Hollis Johnson that radio stations were not extremely profitable ventures and that, although the income of Station WLBB has been increasing for the last three years, net profits have been decreasing due to the increased cost of doing business. Also, I told Hollis Johnson that it had been necessary to refinance WLBB's note at the bank for purposes of a down payment on another station.

I categorically deny that I told Hollis Johnson that the petition was filed for purposes of delay; that the character issue was only used because I was grasping at straws; that I needed to have a delay in the grant of the Radio Carrollton application; that I would not have used the character issue had I known that other objections to the application would be raised; that WLBB was having financial difficulties as a result of expansion; and that the station was presently supporting the other stations owned by Faulkner Radio, Inc. and had money problems.

I have not engaged in the misuse of the Commission's processes and I would not take any action which would place the license of WLBB in question.

12. In addition to their affidavits, both Mr. Hollis Johnson and Mr. Robert Thorburn were thoroughly cross-examined on the facts and events that form the context of the June 20, 1968 telephone call. Mr. Hollis Johnson's expanded version of what transpired is as follows: Shortly before June 20, 1968, Mr. Hollis Johnson received a telephone call from his Washington communications counsel who informed him that Faulkner Radio had filed a Petition to Deny Radio Carrollton's application. Subsequently, Mr. Hollis Johnson came into his office, on the morning of June 20, 1968 and found that Mr. Robert Thorburn had called him and had left word that he should return the call. He was surprised that Thorburn would call him, inasmuch as he could not understand why Thorburn would contact him after attacking his character. In returning Thorburn's call, therefore, he asked his secretary, Linda Vaughn, to listen in on the conversation from his end. Linda Vaughn had an office adjoining Mr. Johnson's and the connecting door was left open during the Johnson-Thorburn conversation. Linda Vaughn then placed the call back to Robert Thorburn.

13. During the phone conversation between Messrs. Hollis Johnson and Thorburn, Johnson jotted down phrases and ideas on a note pad, a practice that he adheres to rather mechanically, it appears, when he talks about any important business.[5] After the conversation ended, Mr. Johnson called his Washington communications counsel and related what had happened. Washington communications counsel advised that he write a letter to Thorburn to advise that he was giving his counsel a detailed statement about that telephone conversation. He then prepared a statement describing his conversation with Thorburn. He used his written notes to prepare that statement. Linda Vaughn typed up his statement, and Hollis Johnson then swore to the truth of the statement before Linda Vaughn, who was also a Notary Public.[6] Johnson testified that portions of the statement set out in single quotes were not direct word-for-word quotations but were essentially almost word-for-word true as taken from the contemporaneous notes he had made.[7]

14. Mr. Hollis Johnson also testified that he had had no other telephone conversation with Mr. Robert Thorburn either before or after the June 20, 1968 conversation. This testimony conflicts directly with Mr. Thorburn's statement that Mr. Hollis Johnson had called him (Thorburn) at the time Radio Carrollton filed its application.

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[5] Shortly after the telephone conversation Mr. Johnson also had mentioned the fact and substance of the conversation to his partner, William P. Johnson.

[6] Linda Vaughn also prepared a brief statement which will be discussed, *infra*.

[7] Hollis Johnson no longer has the note pad with the written jottings and ideas on it. He disposed of those notes later.

15. Faulkner's original character allegations against Mr. Hollis Johnson, *i.e.*, the character allegations contained in the June 18, 1968 Petition to Deny, centered around a so-called Loyd Madden incident.[8] Mr. Hollis Johnson testified further, regarding his telephone conversation with Thorburn on the character allegations, that Thorburn had voluntarily brought up the matter of Thorburn's reasons for raising such character allegations; that Thorburn not only apologized for having done so, but even used the word "apologize"; that Thorburn had specifically declared he had only raised the Loyd Madden matter because he was, and Thorburn used these exact words, "grasping at straws"; and that he (Johnson) told Thorburn that the Madden incident was a straightforward business matter and there was no problem that would reflect on his (Hollis Johnson's) character. Mr. Johnson's testimony directly conflicts with Thorburn's initial categorical denial that Thorburn had only raised the character issue because he was "grasping at straws". It also conflicts with Thorburn's affidavit, insofar as Mr. Thorburn suggested that it had been Hollis Johnson who first had brought the Loyd Madden character issue into the phone conversation when he ". . . stated that he was sorry that his character had been brought into it, to which I responded that I was sorry that it was necessary to do so. . . ."[9] Hollis Johnson's testimony also conflicts with Mr. Thorburn's reiteration in testifying herein that he had never apologized to either Hollis or William Johnson for questioning their character qualifications (T. 219).

16. Mr. Hollis Johnson testified further that he had never told Mr. Thorburn that, due to the Faulkner Petition to Deny, he (Johnson) felt that his application would not be granted (T. 178–179). This statement conflicts with Thorburn's original sworn statement that ". . . Hollis Johnson stated his application probably would not be granted as a result of the filing of the petition. . . ."

17. Regarding Mr. Thorburn's statement that he needed a delay of Radio Carrollton's application of four or five months, Mr. Hollis Johnson testified that Thorburn expressly used the word "delay"; and that Thorburn even explained why he needed a delay of four or five months, *i.e.*, that Faulkner had recently purchased several broadcast stations, that it was trying to acquire new stations, and that there was a new shopping center coming into Carrollton and Faulkner wanted to sell its advertising to the merchants there before Radio Carrollton could get there in competition with it. This testimony conflicts with Mr. Thorburn's categorical denial that he had told Hollis Johnson that the Petition to Deny was filed for purposes of delay, and Thorburn's testimony that he had used the term "four or five months delay" in a totally different context.[10]

18. Mr. Hollis Johnson also reaffirmed his prior statements that Mr. Thorburn had told him during the telephone conversation in

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[8] In its Designation Order (38 FCC 2d 68, at para. 4–8), the Commission declined to specify an issue which would permit inquiry into the 'Loyd Madden incident'. The parties herein have abided by that determination. However, insofar as some of the information surrounding the Loyd Madden matter relates to the inquiry regarding the 'abuse of process' issues, the record does include such facts.

[9] When Thorburn was asked why, after filing his Petition to Deny, he chose to call Hollis Johnson and not William Johnson, Thorburn replied, "Hollis was more directly involved with the Madden situation" (T. 218). Such testimony suggests that Thorburn made the phone call to Hollis Johnson with the full expectation of discussing the Loyd Madden character allegations.

[10] Hollis Johnson pointed out that he had had no idea as to how long Faulkner's Petition to Deny would delay a grant of his Radio Carrollton's application.

question that Faulkner was having financial difficulties as a result of its rapid expansion to Slidell, Louisiana and Auburn-Opelika, Alabama; that Station WLBB was presently supporting the other stations owned by Faulkner Radio; and that he (Thorburn) was having money problems.[11] This reaffirmation is in direct conflict with Mr. Thorburn's categorical denial that he told Hollis Johnson that Station WLBB had been having financial difficulties as a consequence of expansion and that it was supporting Faulkner's other radio stations, and that Faulkner was experiencing money problems.

19. Mr. Thorburn's version of his June 20, 1968 conversation with Mr. Hollis Johnson was elaborated upon when he testified, in turn, during the hearing. Unlike Johnson, the evidence shows that Thorburn made no contemporaneous notes, and in fact, that he had done nothing whatever to confirm his memory of the event. Therefore, it is not surprising that his testimony includes contradictions or inconsistencies, considering the 5-year time lapse involved, and that Faulkner's entire effort to 'nail' Radio Carrollton seemed insincere and contrived. Moreover, instead of responding vaguely when perhaps vagueness was called for, or in candidly admitting failures to remember where he did not recall, Mr. Thorburn seems to have endeavored from the witness stand to patch up what appeared to be a contrived and wholly self-serving version, favorable to Faulkner, of course, as to what had actually transpired. What emerges in effect is the image of a hard-pressed witness striving unsuccessfully to remake the facts so as to sustain an essentially distorted position of his own previous making. It is illustrative that at two points where Mr. Thorburn testified he had first reviewed a copy of the Radio Carrollton application in Mr. Hollis Johnson's law office in June or July of 1968, he had to change this testimony in order to state that he had reviewed the application in December of 1967, within a week after Mr. Johnson had called him and invited him up to view the application. At one point (T. 200–202) he testified that Hollis Johnson had taken the initiative by calling him and inviting him to his office to see the application, whereas at another (T. 334, 335) he testified that it was he who had initially called Johnson to make arrangements to examine the Radio Carrollton application. (In this connection, Thorburn's testimony also indicates he had first learned of Radio Carrollton's filing on December 6, 1967 when in Auburn, Alabama on a business trip; that Mr. Al Cohen (see *infra*) had telephoned him to state that a legal ad would appear in the local newspaper to announce the filing on the following day; that the notice did appear in the newspaper and Thorburn had read it.) There were indeed several instances in Thorburn's testimony which, at the very least, add up to an indication of careless indifference to the requirement of truthfulness and candor in dealing with the Commission. So that the entire matter may be placed in proper setting, in order to avoid suggestion that isolated examples might have been wrenched from context and singled out, to Mr. Thorburn's and Faulkner Radio's disadvantage, further details on Thorburn's testimony are here explicitly taken account of.

20. Thorburn testified that after he learned of Radio Carrollton's filing he thought about it and decided that two stations in Carrollton

[11] Hollis Johnson indicated that prior to his telephone conversation with Thorburn, he (Johnson) did not even know that Faulkner Radio had filed for Slidell, Louisiana, or Auburn-Opelika.

could survive financially and therefore that there was no reason for him to try to hold off competition for Station WLBB. Yet, approximately 4 or 8 weeks after the Johnsons' ad was published in the newspaper, Thorburn admitted, he decided to check Radio Carrollton's application "just to keep them honest". At that point in his testimony, it appeared that it had not been until April or May of 1968 when Thorburn first decided to file a Petition to Deny the Radio Carrollton application; whereas elsewhere in his testimony it appears that as early as January of that year he had been discussing the 'Loyd Madden incident' with a view to including allegations thereon in such a petition.

21. During the hearing Thorburn also reaffirmed his earlier remark that he had never told Mr. Hollis Johnson he needed to delay a grant of Radio Carrollton's application. Consistent therewith, as regards the financial situation of Faulkner that he admitted having mentioned to Hollis Johnson, he replied "No" to the query of the Presiding Judge whether he had been trying to give Johnson the impression the petition to deny was filed because he wanted to protect Faulkner's financial position. Inconsistently, however, he was totally unable to provide a reason for having volunteered financial information to Mr. Johnson, a potential competitor, if in fact he was not seeking, in this conversation, to persuade Johnson not to compete, or to refrain from competing at least for a time (T. 348–350).

22. Up to this point in the narrative, it is abundantly clear that there have been what appear to be significant differences between Hollis Johnson's and Thorburn's versions of their crucial June 20, 1968 telephone conversation and that Thorburn's version was weakened by his inconsistent and seemingly vascillating testimony. Certainly the Presiding Judge's admonition during the first prehearing conference that each applicant ought to make a full and adequate disclosure of the pertinent facts in advance of the hearing itself is exposed as fully warranted. While both the parties have adduced general character evidence, this is obviously of little value in resolving the present controversy. *Cf. Nick J. Chaconas*, 35 FCC 2d 698. The final solution to the dilemna could be made to depend, as was suggested during the prehearing conference, upon a comparison of the demeanor while on the witness stand of the two protagonists, as the Presiding Judge observed it, and upon the seeming forthrightness of the Johnsons and their eminence as members of the Bar in comparison with Mr. Thorburn's equivocation and past performance record. Yet there were other factors that have been adduced on the present record that are even more definitively clinching of Radio Carrollton's position and contrary to Faulkner Radio's.

Faulkner's Motives—The Holey Matter

23. Regarding the motivations of Faulkner and whether Faulkner has, in fact, attempted to corrupt the Commission's processes for the purpose of delaying or preventing a grant of a potential competitor's application, there is evidence in the record that simply was not adequately explained or refuted by Faulkner, pointing to an effort by Thorburn to ascertain the possibilities of having a "strike" applica-

tion filed against Radio Carrollton. For it appears that on May 20, 1968, the day after Radio Carrollton's application had been placed on the Commission's "cut-off list" for processing applications, Thorburn had sent a letter to Faulkner's consulting radio engineer, Mr. W. J. Holey, which, in pertinent part, reads as follows:

> **Dear Mr. Holey: It was nice spending an evening with you earlier this month. . . .**
>
> **I realize that you have a very big job this summer, so I wanted to ask to see if you had time to find another location where 1330 kc will fit as well as the frequency of 1500 kc.**
>
> **Let me know as soon as you can as I have a feeling that the application for Carrollton may be withdrawn . . .**

And on May 27, 1968, Mr. Holey responded:

> **Dear Bob: The 1330 kc application for Carrollton was put on the cut-off list May 19th and will be free and clear June 19th, so I do not see that anything can stop it, or slow it down, now. . . .**

At least in the absence of a contrary explanation that made sense, taking account the timing of this correspondence, it would appear therefrom that Thorburn was seriously looking for a method of obtaining a delay in the approval of the Radio Carrollton application by this Commission. This would be indicative of Thorburn's state of mind or intentions at the time. In this context, moreover, it is doubly suspicious and at the very least, a reflection upon his carefulness as a witness that Mr. Thorburn, before he was confronted with this correspondence, expressly denied from the witness stand having consulted with Mr. Holey as to the possibility of finding another location wherein the frequency 1330 kc would fit.

24. Thorburn also expressly denied ever having discussed with Mr. Holey what the chances were of holding up Radio Carrollton. On the contrary, he declared that there had been a letter from Mr. Holey of the year before (1967), at a time when Thorburn had been seeking a better frequency for Station WLBB and at that time he had asked Holey to conduct a frequency search, which was before the Radio Carrollton application had even been filed. Thorburn asserted that he had no copy of this particular letter because ". . . Things were stolen from my office" . . . (T. 291). It is significant perhaps that before this matter came up during the hearing Mr. Thorburn had testified that, as of June of 1968, except for its three applications for Slidell, Rockmart and Cedartown, Faulkner was not interested in acquiring other facilities. When he was then confronted with Mr. Holey's letter of May 27, 1968, however, Mr. Thorburn had to concede having received that letter, but his explanation for it was merely that during a "social" conversation with Holey, who happened also to be his friend, he had asked the latter to check on the status of Radio Carrollton's application and that Holey had agreed to do so. Mr. Holey, he stated, did what he did in the past for Mr. Thorburn, namely, supplied him with information Thorburn had never sought. Thorburn then explicitly denied asking Holey to find another location where the frequency 1330 kc would work. He was then confronted with his own letter to Mr. Holey of May 20, 1968 and was asked if he remembered it. The immediate response was: "I apparently had forgotten it" (T. 299). Thorburn then equivocated as to his authorship of the letter, after which he finally

admitted "probably" having prepared the May 20, 1968 request to Mr. Holey.

25. Regarding Mr. Holey's May 27th response, *supra*, where Holey spoke of not being able to stop or slow down Radio Carrollton's application, Mr. Thorburn stated that this was one of those instances where Holey had answered a question Thorburn had never asked. Yet, when he was asked why he had stated in his letter of May 20, 1968 to Holey that he had ". . . a feeling that the application for Carrollton may be withdrawn", Thorburn was unable to explain why he had said that to Holey. Thorburn admitted it sounded unusual, but he could not recall what gave him the impression that the Johnsons might dismiss their application.

26. W. J. Holey, Faulkner's consulting engineer, also testified. When he was asked to explain Mr. Thorburn's May 20th request that he find another location where 1330 kc would fit, Holey first testified he did not know, at that time, that Radio Carrollton had even filed for the frequency. However, when his attention was called to the third paragraph of the May 20 letter, Holey admitted he knew at the time that the Johnsons had filed for 1330 kc in Carrollton. Mr. Holey also testified that Thorburn had never told him why he wanted to find another location where 1330 kc would fit. However, he declared that he never had conducted the investigation requested by Thorburn in his May 20, 1968 letter.

27. Regarding the first paragraph of his May 27, 1968 response to his reference to being unable to stop or slow down Radio Carrollton's application, Mr. Holey was unable to explain why he had told Thorburn that. While denying that Thorburn had asked him to look into the possibility of stopping or slowing down Radio Carrollton's application, he stated that ". . . I don't know why I used that language . . .", and ". . . I don't see why I told him that. . . ." On the other hand, Holey contended that, as an engineer, he is careful with his use of words.

28. At first Mr. Holey testified that he had *volunteered* the information in his May 27th letter about being unable to stop or delay a grant of Radio Carrollton's application. Later, however, in response to questions of the Presiding Judge he appeared equivocal on this point (T. 545):

Judge Kraushaar: Did he ask you specifically how to slow down the Radio Carrollton application?
The witness: Not that I remember.
Judge Kraushaar: You don't remember.
The witness: No, I don't remember.
Judge Kraushaar: You might have done it, but you don't remember, which is it?
The witness: Right. I would say no, he didn't ask me that. He did not ask me that. After all, that's how many years ago.
Judge Kraushaar: Well, all right. If that's the way it is.
The witness: That's the way it is as far as I'm concerned.

The Previous Submission of Incorrect Affidavits by Thorburn

29. It has been established, as will be detailed hereinafter (para. 63 *et seq.*), that Mr. Thorburn, Faulkner's Vice-President and General Manager, did submit a document to the Commission that he

represented was an affidavit (of one Orin Whitman) which was not really an affidavit. It also was brought out that Thorburn, on an earlier occasion, had participated in the issuance of false affidavits in connection with alleged fraudulent billing by Station WBTR-FM, Carrollton, Georgia during January, February, and April of the year 1968. Indeed, Thorburn's participation in the prior fraudulent billing scheme was explicitly summarized by the Commission at paragraph 4 of a Memorandum Opinion and Order released June 23, 1969:

> 4. Thus, the licensee's plea that it should not be held liable is based upon the bare assertion that it did not *knowingly* issue false affidavits. However, as stated above, the Vice-President of the licensee and general manager of the station (Robert Thorburn) notarized two of the false affidavits and thus participated in the acts in question. The acts of an officer or general manager of a corporate licensee are the acts of the licensee. . . . The licensee here does not appear to have exercised . . . [reasonable] . . . diligence, particularly in view of the fact that, according to an official of the Alexander Company, the licensee was discovered by the distributor in 1965 to have been submitting affidavits which did not reflect the advertising actually broadcast as recorded in the program logs. According to the distributor, "we refused to authorize use of this station for several months after our log check and then after discussions with Mr. Bob Thorburn resumed using the station in 1966 and continued until we made another log check in May of 1968". Thus, licensee was made aware as long ago as 1965 that it had issued false affidavits and the continued issuance of false affidavits in 1968 clearly indicates lack of reasonable diligence on its part.

30. Mr. Thorburn's testimony during the hearing herein regarding his role in past fraudulent billing is a further reflection of his evasiveness and lack of candor. For when he was first questioned about the matter he said he had not prepared the false affidavits of performance but had only acted as a notary to notarize certain affidavits prepared by someone else whereas, subsequently, on redirect examination, he testified:

> Q. Now the affidavit resulting in the forfeiture—was that notarized by you?
> A. No.
> Q. I will ask you again, the affidavits which resulted in the forfeiture proceeding . . . were any of those affidavits notarized by you?
> A. May I see them?
> Q. Well, let me show you a copy of . . . the Commission's letter of January 31, 1969, what it states on the bottom sentence, if you will look, please.
> A. Yes. It says I notarized it.
> Q. Some of those were notarized by you, is that correct?
> A. Right.
> Q. Were they prepared by you?
> A. Yes. I think they—yes, they were prepared by me.
> Q. Did you prepare those affidavits and did you notarize them?
> A. I think I did, Mr. Rosenberg.
> Q. So, you prepared an affidavit of performance by yourself and notarized your own affidavit?
> A. Very possibly—evidently I did. I don't really recall, sir.
> Q. Do you recall whether you prepared those affidavits?
> A. No, I don't recall.

Faulkner's Previous Petition to Deny in Slidell

31. According to Mr. Hollis Johnson, Thorburn, in the critical June 20, 1968 conversation, declared "that there was no way he could prevent the license from being granted but for personal reasons he

needed a delay in Radio Carrollton's application for four or five months". Mr. Thorburn's version differed. He maintained that Hollis Johnson had stated that his application probably would not be granted as a result of the filing of the petition. Thorburn then declared that "I replied that it might only be delayed four or five months. This was my only reference to time and was intended only to indicate that the Commission could grant the application if it determined that the matters presented could be resolved in Radio Carrollton's favor."

32. It was brought out that Thorburn had filed a similar type of Petition to Deny [12] in the Slidell, Louisiana proceeding (Docket No. 18413) on May 8, 1967 and that, seemingly, as a consequence, that proceeding was not designated for hearing until January 7, 1969. Thus, Thorburn should have been aware that the filing of such a Petition to Deny in the instant proceeding would probably delay a grant of Radio Carrollton's application for much longer than only four or five months.

The Loyd Madden Allegations

33. Predicated upon an affidavit purportedly [13] sworn to by Loyd Madden on June 6, 1968, wherein Madden asserted that Hollis B. Johnson fradulently acquired a parcel of Madden's real estate in the course of their attorney-client relationship, Faulkner asserted character allegations against the Johnsons in its original Petition to Deny. Near the end of such relationship, Madden allegedly asserted, Johnson had coerced him into signing a blank deed with no one else present; that the transaction had occurred on January 21, 1967, and that subsequently the deed had been completed, witnessed by William Johnson and a Linda Jeter, and recorded on May 26, 1967. In late 1967, it appears, Madden had filed a petition in bankruptcy. On December 4, 1967, the trustee in bankruptcy instituted a suit against Hollis B. Johnson to recover the property for the benefit of creditors. The case was settled, however, in January 1968 and Hollis B. Johnson had received $800.00 of the legal fees owed to him in exchange for the deed.[14] Thus, it appears that the Loyd Madden-Hollis Johnson incident had been settled before Mr. Thorburn got into the act with the Faulkner Petition to Deny. Moreover, Thorburn, the evidence indicates, had been aware that the Madden-Johnson conflict was settled for several months at the time he filed the Petition to Deny on June 18, 1968.

34. Thorburn, the evidence discloses, first learned of Madden's bankruptcy from a local attorney, Robert Tisinger, at a social meeting in January 1968. Mr. Tisinger had been the attorney for the Trustee in Bankruptcy in the Madden case. He was also a former ⅓ owner of Station WLBB, Faulkner's standard broadcast station in Carrollton.

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[12] In the Slidell proceeding, Faulkner's Petition to Deny raised three issues, *i.e.*, an ascertainment-of-needs, a financial, and a character issue. In the present proceeding Faulkner's initial Petition to Deny raised the same three types of issues.

[13] Mr. Thorburn, who actually prepared Loyd Madden's initial affidavit, was unable to recall the circumstances underlying the affixing of the notary seal and the administration of the oath. Accordingly, it cannot be assumed that the Madden paper was in fact sworn to, especially in the light of the evidence concerning the so-called Whitman matter, *infra*.

[14] It is to be stressed that the Commission has concluded that no inquiry into Hollis Johnson's character was warranted insofar as the Loyd Madden affair is concerned. However, insofar as those events bear on the question whether Faulkner has attempted to delay the proceeding of Radio Carrollton's application, such facts are relevant herein.

It thus appears that it had not been until the first half of 1968 (after the Madden-Johnson matter was settled) that Thorburn first contacted Loyd Madden.[15]

55. Mr. Thorburn's testimony concerning his role in regard to the Loyd Madden incident presents a grave question. For, despite his attempts to minimize his role, the evidence adduced herein is circumstantially persuasive that Thorburn had been trying to stir up new trouble between Madden and the Johnsons for his own selfish purposes.[16] Indeed, Thorburn had first testified he had only had two meetings with Loyd Madden: that, at the first meeting, he had asked Madden if the latter would be willing to execute an affidavit regarding the alleged fraudulent property acquisition: and that he (Thorburn) then prepared an affidavit, went back to see Madden a second time and had him sign that affidavit. He stressed that these were the *only two* conversations he had had with Madden. More specifically, he denied ever telling Madden, or even suggesting to Madden, that Madden ought to file a grievance against Hollis B. Johnson with the Carroll County Bar Association Grievance Committee.[17] Thorburn did state, however, that at the second meeting, when Madden had signed the June 6, 1968 affidavit, Madden had indicated he planned to go to the Bar Association Grievance Committee. When he was asked how he had managed to obtain a copy of an October 21, 1968 letter complaint that Madden filed with the Grievance Committee, Thorburn replied that Madden had voluntarily sent him a copy of that complaint: however, he testified that the only thing in the letter was the copy of the complaint: *i.e.*, that there had been no note or cover letter from Madden explaining the document's significance. He stressed that he had had no verbal communication with Madden between June 18, 1968 (when Faulkner filed its initial Petition to Deny) and October 21, 1968 (when Madden filed his grievance). Subsequently, however, it developed that Thorburn had had a *further* conversation with Madden between June 18, 1968 and October 21, 1968; that he had, in fact, obtained another affidavit from Madden which was purportedly subscribed and sworn to on August 9, 1968[18]; that they had, in fact, discussed the possibility of Madden's filing a grievance with the Carroll County Bar Association; that Madden asked Thorburn if he should file such a grievance; and that Thorburn replied, ". . . if you have the grounds or if you feel you should, yes."[19]

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[15] At another point, Thorburn testified that he had first contacted Loyd Madden because Mr. Tisinger had told him that this was the worst thing he (Tisinger) had seen an attorney do; and that he (Tisinger) did not think that the Johnsons should have a radio station. Such testimony does not harmonize with his testimony that he did not decide to file a Petition to Deny against Radio Carrollton until much later.

[16] In referring to the Madden incident, the Presiding Judge indicated his difficulty in believing Thorburn that he did *not* file a Petition to Deny that would tarnish Attorney Johnson's reputation in order to stave off competition (T. 350-352).

[17] Madden did file a complaint with the Grievance Committee of the Carroll County Bar Association, on October 21, 1968. A copy of the letter complaint was attached to a "Supplement" to a Petition to Deny filed by Faulkner January 3, 1969. At T. 361, Thorburn did concede that at the second meeting with Madden, they "possibly discussed" Madden's filing a grievance.

[18] The so-called affidavit mentioned above is attached to Faulkner's Reply dated August 13, 1968.

[19] While Thorburn claimed he felt very strongly that Madden's cause was just and that "it was something against the law that Mr. Johnson did," he did not recall telling Madden on August 9, 1968 that he (Thornburn) thought he had good grounds for filing a grievance. Attached to its Opposition to Faulkner's original Petition to Deny, filed July 25, 1968, Radio Carrollton presented numerous affidavits attesting to Hollis Johnson's good character. One of those affidavits was from William J. Wiggins, Chairman of the Grievance Committee of the Carroll County Bar Association. That affidavit indicated that there had never been any grievance filed against Hollis Johnson. Thorburn admitted having read Radio Carrollton's Opposition of July 25, 1968 and more specifically Wiggins' affidavit.

Linda Vaughn's Testimony

36. As previously noted, at the time Mr. Hollis Johnson prepared to place his telephone call back to Mr. Thorburn, he instructed his secretary, Linda Vaughn (now Mrs. Coffelt), to listen in on the conversation from his end. She did so. She testified herein. And while her testimony is of limited value, it does help nevertheless to support and corroborate Mr. Johnson's testimony in certain respects. Thus, she testified that Johnson had expressed his appreciation to Mr. Thorburn for having the decency to call to apologize for the attack on Johnson's personal character qualifications. This testimony, it appears, is in conflict with Thorburn's version of the conversation. For, according to Thorburn, he (Thorburn) never apologized; nor did he initiate the conversation regarding the attack on Hollis Johnson's character. Again, according to Thorburn, "Hollis Johnson stated that he was sorry that his character had been brought into it, to which I responded that I was sorry it was necessary to do so. However, my statement was never intended to indicate that there was not any basis for filing of the petition. I believe that the matters stated in the petition are necessary for the Commission to consider in passing on the application. . . ."

THE FINANCIAL CONFLICT

37. Another area of conflict centered about what Thorburn allegedly had told Mr. Hollis Johnson during the June 20, 1968 telephone conversation concerning WLBB's and Faulkner's financial status. According to Mr. Johnson, Thorburn told him that Station WLBB and Faulkner had been having financial difficulties as a consequence of the rapid expansion to Slidell, Louisiana, and Auburn-Opelika, that Station WLBB was presently supporting the other stations owned by Faulkner, and that he (Thorburn) had money problems. Thorburn, on the other hand, declared: "I categorically deny that I told Hollis Johnson . . . that WLBB was having financial difficulties as a result of expansion; and that the station was presently supporting the other stations owned by Faulkner Radio, Inc. and had money problems." However, he did state that he did tell Johnson, *inter alia*, "that, although the income of Station WLBB had been increasing for the last three years, net profits have been decreasing due to the increasing cost of doing business."

38. During the prehearing conference herein Broadcast Bureau Counsel suggested that Faulkner provide the necessary evidence to show what Faulkner's and Station WLBB's financial picture was at the time of the crucial phone call (T. 34–35). Apparently in consequence, Faulkner placed in evidence the 1967 Annual Financial Reports (Form 324) for Faulkner Radio, Inc. Stations (Faulkner Ex. 4); Financial Statements of Faulkner Radio, Inc. for Periods Ending December 31, 1967 and February 29, 1968 (Faulkner Ex. 5); Faulkner Radio, Inc. Sections 1, Applications to License, WFRI, Auburn, Alabama and WAOA, Opelika (Faulkner Ex. 6); Record of Promissory Notes With The Peoples Bank, Carrollton, Georgia (Faulkner Ex. 7); a list of Faulkner's broadcast interests and a list of dismissed or denied applications (Faulkner Ex. 9); and Financial

Statements of Faulkner Radio, Inc. for fiscal year ending October 31, 1965, October 31, 1966 and October 31, 1967 (Faulkner Ex. 10). A review of the financial documents thus presented by Faulkner indicates that during the first six months of 1968 Faulkner had had to borrow $120,000.00 from the bank ($60,000.00 for Cedartown and $60,000.00 for Opelika); that it was also committed at that time to construct two stations in Slidell and one at Rockmart through bank loans and deferred credit; that the amount of Faulkner's monthly debt payments increased from $1,000.00 to $1,500.00; that of the Faulkner stations then in operation only Station WLBB, Carrollton was showing a profit; and that the Faulkner net income had decreased between the years 1965 and 1968.

Issue 1—The So-Called "Ascertainment-of-Needs" Issue

39. The Commission has included an issue to determine the efforts made by Radio Carrollton to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests (38 FCC 2d 68, Issue 1). The following paragraphs (40–47, incl.) deal with this matter.

40. After Radio Carrollton's application was designated for hearing, its counsel called Mr. William Johnson and provided him with a detailed outline of what the applicant must do in order to meet the ascertainment-of-needs issue. William Johnson was instructed to survey an equal number of Whites and Blacks. An exhibit was prepared describing the city of Carrollton and the surrounding territory. A survey form was prepared containing the pertinent identifying questions for each person to be interviewed along with the question, "What in your opinion are the most pressing needs in the community as of the present time?"

41. Mr. William Johnson used the Carrollton Chamber of Commerce Brochure and the city telephone directory in order to ascertain which community leaders and members of the public should be interviewed. The Johnsons consciously attempted to set up a cross section of community leaders to be interviewed.

42. Apart from Carrollton, Georgia, William Johnson utilized a map prepared by the applicant's consulting radio engineer in order to determine what additional communities were within his proposed service area. He therefore determined that Radio Carrollton ought to interview individuals in Bremen, Temple, Villa Rica, Bowden, Whitesburg, Rosco, Lowell, Roopville, and Centralhatchie. The Johnsons then divided Carrollton, Georgia into quadrants. William Johnson was assigned the task of interviewing those people located in the northwest and southwest quadrants, while Hollis Johnson was assigned the northeast and southeast quadrants. As for the outlying communities, William Johnson was assigned to interview in the communities to the north of Carrollton and Hollis Johnson took the communities to the south.

43. The surveys were in fact conducted personally by the Johnsons during January 1973. Most of the surveys (85 to 90%) were conducted by means of person-to-person interviews. The remainder were conducted by telephone.

44. William Johnson's secretary then typed up the survey analysis sheets. William Johnson himself checked the typed sheets against the original sheets to be certain his secretary had not overlooked any of the interview forms. He then made an evaluation sheet based upon the survey forms, *i.e.*, he drew up a summary form showing the "needs" of the community disclosed by the survey. This evaluation sheet lists the "needs" in the order of how frequently they were mentioned. For example, traffic was the problem most mentioned, so it was listed first. William Johnson then arranged proposed programs to meet such needs. The program titles were actually brought forward from the 1971 survey analysis. The Johnsons keyed the latest set of needs to the earlier program titles after what they discovered in 1971 had been reconfirmed in 1973.

45. The material thus collated was then forwarded to Radio Carrollton's Washington Communications Counsel. The latter then called William Johnson and indicated they had not interviewed enough Blacks. So the Johnsons thereupon proceeded to interview additional black people; they telephoned their additional survey results to Washington Communications Counsel; and they discussed with Counsel what effect, if any, the additional survey would have on the already completed evaluation. It was determined that no additions were needed. The total effort culminated in the introduction and acceptance into evidence of Radio Carrollton Exhibit 1 (T. 56–58; and 413–414), which, *inter alia*, shows the following:

(a) Carrollton, Georgia is located in Carroll County and is 48 miles southwest of Atlanta. In 1940 Carrollton had a population of 6,214. By 1960 the population had increased to 10,973. The 1970 census shows a city population of 13,325 people. 19.7% of the population is non-white.

(b) There are 73 manufacturing firms in Carroll County, Georgia and 45 of them are in Carrollton. Diversified industries include food processing, electrical cable, textile, metal working and leather goods. West Georgia College is located in Carrollton, and has an enrollment of about 6,000 students. There is also a vocational-technical school in Carrollton.

(c) Carrollton has 6 public schools and one private academy. It has 20 churches, a Veteran of Foreign Wars, a County Club, the Carrollton Moose Lodge, a Masonic Temple, and various college fraternities and sororities. Its service organizations include Rotary International, Lions Club, Kiwanis International, Optimists, Civitans and Carrollton Jaycees.

(d) An analysis of the individuals interviewed shows that the applicant interviewed business leaders, government leaders, civic club officers, educators, clergy, skilled and unskilled laborers, students and housewives. Of the 98 residents of Carrollton that were interviewed, 19 were Negroes. Six of the 49 interviewees located in the remainder of the service area were Negroes. Radio Carrollton made an express effort to interview a representative cross section of age, interest, and occupational groups. Twenty-five of those Carrollton residents who interviewed were women, while 15 of 49 interviewees located in other communities were women.

46. The Radio Carrollton survey evaluation discloses that Carrollton, Georgia and the surrounding area has the following 27 needs: (1) traffic patterns and control; (2) improved medical and hospital services; (3) better communications; (4) lack of good educational standards; (5) need for new industry and employment opportunities; (6) need for better recreation and cultural activities; (7) need for better telephone service, sewage facilities and garbage pick-up; (8) need for better schools and better teachers; (9) more effective law enforcement and improved jails; (10) need for new sources of revenue and property tax relief; (11) need for legalized liquor; (12) need for a humane society and animal shelter; (13) need for improved race relations; (14) help for the underprivileged; (15) more effort toward beautification; (16) need for new building and zoning codes; (17) better drug control; (18) coordinated city-county planning; (19) better college-community relations; (20) a county-wide ambulance service; (21) assistance for fixed income persons; (22) expansion for commercial businesses; (23) need for more low income housing; (24) need for legal aid for those unable to pay; (25) need for a stronger voter registration effort; (26) improved fire protection; and, (27) day care for children.

47. Radio Carrollton proposes to meet the foregoing needs through the following specific programs: (a) "Thought For The Day"—a three-minute religious feature aired twice daily, seven days a week, at 7:30 a.m. and 4:30 p.m. This program is addressed to needs 3, 13, 14 and 18 in para. 46, *supra;* (b) "Sunday Morning Worship Service"—the services of an area church will be broadcast each Sunday at 11:00 a.m.; (c) "The People Speak"—a two-minute public affairs feature to be aired twice daily, Monday through Friday at 8:30 a.m. and 12:30 p.m. This feature will present responsible citizens who wish to be heard on topics of their choice. If requested, equal time will be afforded those responsible citizens with opposing views. This program would be responsive to all 27 needs set out in para. 46, *supra;* (d) "Take One"—a weekly half-hour public affairs program presented at 10:30 a.m. each Saturday on topics of local interest. It would be responsive to all 27 needs set out in para. 46, *supra;* (e) "Coffee Break"—a one-hour telephone conversation program presented each Saturday morning at 9:00 a.m. It is expected that this would be a forum for public discussion and airing of problems including all 27 set out in para. 46, *supra;* (f) "A Visit With The Governor"—a weekly five-minute program presented on Mondays at 2:30 p.m. This program would be expected to deal with the problems set out at para. 46, *supra*, (4), (5), (8), (9), (10), (17), (18), (21) and (25); (g) "Norman Talmadge From Washington"—a weekly five-minute program presented on Tuesdays at 2:30 p.m. This program will feature Georgia's Senior Senator discussing topics of importance in the national Congress and will deal with such problems as are set forth at para. 46 (2), (5), (8), (9), (21), (23) and (25), *supra;* (h) "Community Calendar"—a one-minute summary of upcoming area events to be aired twice each hour; it is designed to deal with problem in para. 46 (3), *supra;* and (i) "This Week at West Georgia"—a fifteen minute program produced during the college year by West Georgia College and

aired on Saturdays from 10:15 to 10:30 a.m. It is designed to be responsive to problems in para. 46 (3), (4), (6), and (10), *supra*.

Issue 2—The Financial Issue Against Radio Carrollton

48. The Commission has called for an inquiry to determine (a) whether the commitments to Radio Carrollton by the Commercial Bank, West Georgia's National Bank and Peoples Bank are still available to the applicant; and (b) whether the Radio Carrollton partners possess adequate current assets to finance the proposed station.

49. During the hearing the applicant presented valid up-dated commitment letters from the Commercial Bank, West Georgia Bank and Peoples Bank. Each of these three banks committed itself to lend William P. and Hollis B. Johnson $25,000.00 (or $75,000.00 total).

50. The applicant also submitted an exhibit showing its estimated cost of construction and operation through the first year as being $71,482.00. Although the $75,000.00 in loans covers such construction and operating costs, each of the partners has committed himself, as well, to providing any additional cash that might be needed. For this reason, apparently, the Commission requested updated balance sheets for each of the partners (38 FCC 2d 68 at para. 16).

51. Radio Carrollton presented updated balance sheets in evidence. Hollis Johnson's current balance sheet shows total assets of $250,325.00 as opposed to liabilities of $92,470.00. His assets include $12,000.00 cash on deposit, $26,500.00 worth of unencumbered real estate in Roopville, Georgia, and $8,925.00 worth of stocks and bonds.

52. William P. Johnson's updated balance sheet shows total assets of $767,400.00 as opposed to total liabilities of $26,000.00. His assets include $5,500.00 cash on deposit, $541,400.00 worth of unencumbered real estate, and $174,000.00 worth of stocks and bonds.

Issues 3 and 4—The Site Availability Issues Involving Radio Carrollton

53. The inquiry under both Issues 3 and 4 relates to the availability of land owned by O. S. Whitman and designated by Radio Carrollton as its proposed antenna site.[20] Pursuant to allegations raised by Faulkner in a Supplemental Petition to Deny, the Commission specified an issue to determine whether Radio Carrollton had misrepresented to the Commission concerning the availability of that land, and also whether it had kept the Commission advised of substantial and significant changes in regard to the availability of such land, as required by 47 CFR 1.65.

54. At the time they decided to file the Radio Carrollton application, the Johnsons employed a consulting radio engineer. He indicated the general area where a transmitter site could be located. They then checked out the land records in that general area and noted that Mr. O. S. Whitman, a Carrollton resident since 1946 (a farmer and installer of automotive glass) owned 33 acres of land therein. Since William Johnson knew Whitman personally, he opened the negotiations with Mr. Whitman. In 1967, Whitman granted the Johnsons an option

[20] On January 15, 1971, Radio Carrollton filed an amendment to its application specifying a new transmitter site.

on 4 acres of land for a twelve-month period, with the right to extend it for a further period of six months. In return, the Johnsons paid Whitman the sum of $200.00.

55. William Johnson turned over the details of the transaction to Hollis Johnson who drew up the option agreement. However, before Mr. Whitman came to sign the agreement, the Johnsons considered the matter and realized the processing of the application could be a lengthy process. So they decided to insert a two-year option instead of the one-year-six-months option.[21] When Mr. Whitman came in, the Johnsons informed him of the change, inserted it, and gave him the $200.00. The agreement provided that Radio Carrollton would pay Whitman $4,000.00 for the four acres. There is uncontradicted evidence that $4,000.00 is far more than the land is reasonably worth and, in fact, without a specialized use, that it is not worth even the $200.00 the Johnsons paid for the option.

56. Subsequent to the signing of the option, in May of 1970 (the date of Mr. Thorburn's discussion with Mr. Whitman), and even though the written option had terminated, on at least two occasions Whitman, it seems, assured William Johnson that the land was still available if and when Radio Carrollton's application would be granted. There is unrebutted evidence that such transactions are frequently handled by word of mouth in small towns like Carrollton, Georgia.

57. Sometime during April of the year 1970, however, Whitman decided to put a trailer on the land in question. His daughter was about to be married and was going to live in the trailer. Whitman had an attorney, Mr. Aubrey Gilbert, check the terms of the option which was filed at the Courthouse. Whitman had lost his copy of the option. Although he was certain that the terms of the option had run, Whitman wanted to be absolutely positive before he put a trailer on the land. He did not want to be forced to subsequently move it.

58. Sometime during May 1970 Mr. Thorburn approached Whitman. He opened the conversation by asserting that the Johnsons still had an option on the land. Whitman said that that was not so. Thorburn then said, "well, they say that they still have an option on it . . ." and indicated that the Johnsons were going to court.[22] Thorburn then asked Whitman if he would sign an affidavit stating that the option was no longer in effect and Whitman agreed to do so. He subsequently signed a statement that Thorburn prepared and brought him to sign.

59. Sometime during May or June of 1970, William Johnson and Mr. Fred Hutchins (who is the president of the Peoples Bank in Carrollton, Georgia and who at that time was interested in the possibility of buying into the Radio Carrollton application), went to Orin Whitman's place of business to discuss the continued availability of the optioned land. For the first time on that occasion, it seems, Mr. Whitman indicated the land *might* no longer be available and the conversation then became somewhat heated. However, Whitman finally declared that he was going to talk the matter over with his son

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[21] Because of an admitted poor job of legal draftsmanship, conflicting clauses appear in the option agreement. At one point it recites that the term of the option is for two years, i.e., from November 3, 1967 to November 3, 1969. However, paragraph 6 of the same agreement provided for a one-year option period with a six-month extension period. This ambiguity has nothing to do, however, with the subsequent question of site availability.

[22] There was no evidence that the Johnsons had ever indicated to anyone that they intended to take Mr. Whitman to court and, in this sense, consequently, it appears that Thorburn's statement to Whitman was irresponsibly made, without any factual basis whatever to support it.

and, ". . . that if it was still alright with the children that I would still let him [William Johnson] have it."

60. After the William Johnson-Hutchins-Whitman conversation, William Johnson discussed the matter with Hollis Johnson. He informed Hollis that Whitman was waivering and was no longer sure he was going to sell the real estate in question to Radio Carrollton. So, in late May or early June 1970, Hollis Johnson visited Mr. Whitman on two separate occasions. The first was on a Friday. At that time, Whitman told Hollis essentially what he had previously told William Johnson, *i.e.*, that he intended to discuss the matter with his son and that he would let Hollis Johnson know later whether the land would be available. On the following Tuesday, Hollis Johnson again visited Whitman. Mr. Whitman indicated that his son had not returned from college that weekend but that he (Whitman) would let Hollis know whether the land would be available.

61. Both William P. and Hollis B. Johnson indicated that Mr. Whitman had never contacted them to inform them as to the status of the land, and that the first indication they had had that Whitman was not going to make the land available to them was when they were told of the purported affidavit he had given Mr. Thorburn of Faulkner Radio. Indeed, William Johnson had been surprised when Whitman indicated that the land was no longer available because he always expected, it appears, that Whitman would live up to his word and make the land available. In fact, he said, "I thought someone had gotten to him because it was not like Orin Whitman".

62. After the Johnsons received notification that Whitman had given a so-called affidavit to Thorburn, who had filed it with the Commission, they immediately started to search for another site. They were finally able to lease a site from the Carroll County Commissioner of Roads. But, this took about six months. They then amended their application, on January 15, 1971, to reflect the new site. The Johnsons conceded candidly that they had not formally notified the Commission that the O. S. Whitman site was no longer available because they knew that (because of Whitman's affidavit) the Commission was already informed that the site was not available (T. 82, 83). They were more interested, it seems, in finding new property.

63. During the hearing it developed that the Whitman "affidavit" Thorburn had filed with this Commission with Faulkner's "Supplement" to its Petition to Deny of June 23, 1970, was in fact no affidavit at all.[2] Thorburn had prepared this paper personally and never informed Whitman that it would be notarized. Thorburn did not trouble himself, in preparing the document, to mention the fact that Mr. Whitman had advised the Johnsons that he intended to check with his children before making a final decision regarding the availability of his land to the Johnsons. Whitman, of course, never even signed the document in the presence of a notary public as Faulkner had represented in its Petition to Deny. Whitman was never sworn, and Thorburn admitted the document was "notarized" in his own office sometime *after* Whitman had signed it. Perhaps more importantly, however,

[2] Under 47 CFR 1.580(i), allegations of fact set out in Petitions to Deny, except for those of which official notice may be taken, ". . . shall . . . be supported by affidavit of a person or persons with personal knowledge thereof. . . ." Thorburn was certainly aware of this since he had previously filed a Petition to Deny in the Slidell, Louisiana proceeding, as well as the previous Petitions to Deny in the instant case.

when he was asked why he had not accurately stated in the Whitman affidavit he had written up what Whitman had said to the Johnsons. Thorburn's reply was that he did not think it was sufficiently important (T. 267), thereby possibly misleading the Commission into believing the land was not available at a time when its non-availability had not yet, in fact, been determined by its owner.

64. The Presiding Judge asked this question of Mr. Thorburn (T. 265, 266): "Don't you realize that when you submit a document to the Commission which is in the form of an affidavit and it really isn't an affidavit that you are misrepresenting something to the Commission?" Thorburn replied: "I do not realize that. That was an oversight." The Presiding Judge: "You are just realizing it now for the first time?" Thorburn replied, "Yes." Now, the record also discloses that Thorburn himself is a notary public; that, as a notary he had previously notarized affidavits of performance for Station WBTR–FM, Carrollton that misrepresented the quantity of advertising broadcast and the total amounts charged therefor; and that Thorburn had previously submitted affidavits in connection with a Petition to Deny in the Slidell, Louisiana proceeding. Moreover, Thorburn responding to further questions from the bench (T. 378–380), testified that he had not realized at the time the possibility that the so-called Whitman incident would eventually be made an issue herein, so that he never bothered to take any notes of the pertinent discussions he had had with Whitman. It is thus quite apparent that if Mr. Thorburn had not in fact been engaged in a willful and malicious campaign to harass a potential competitor from prosecuting its application (T. 379, 380), he must have been engaged in a mindless, grossly careless, effort to traduce the Johnsons, particularly Hollis Johnson, before this Commission.[24]

65. Moreover, inasmuch as Thorburn had prepared the Whitman statement for signature, questions arise regarding its form. Thus, the face of the document has the name "Hollis Johnson" underlined. And in a Reply to Opposition to Supplement to Petition to Deny, filed August 4, 1970, Faulkner argued as follows (at para. 3 therein): "In his affidavit, Orin S. Whitman stated that during the week of May 11, 1970,[25] he advised William P. Johnson and Hollis B. Johnson that the land was no longer available. The name of Hollis B. Johnson is underlined in the Whitman affidavit, obviously to indicate that Hollis B. Johnson was the partner to whom Whitman directly communicated the further unavailability of the site. . . ."

66. During the hearing Thorburn testified that he did not place the underlining under the name "Hollis Johnson"; that Whitman did the underlining; that he (Thorburn) asked Whitman why he had underlined Hollis Johnson's name but stated that he (Thorburn) was

[24] The Presiding Judge had expressed deep concern during the hearing (T. 352) about persons who file so-called "affidavits" with this Commission that are not in fact affidavits at all. "At the very least", he stated, "such a practice is very careless and may not be condoned." As a matter of simple fact, Mr. Thorburn's conduct as to this matter, as well as to other pertinent matters in issue evinced a grossly flippant attitude and indifference to the pressing need for truth and accuracy by licensees to govern in their relationships with the Commission.

[25] The words "Week of May 11, 1970" were inserted in ink in the Whitman statement (Faulkner Ex. 1). Thorburn stated that Whitman inserted that date (T. 275, 343). Whitman did not remember inserting that date (T. 464).

unable to recall what Whitman had told him was meant by the underlining.

67. Whitman testified on the same subject as follows (T. 486):

> Q. . . . Now, there is an underscoring under the name of Hollis B. Johnson. Who put that underscoring under there?
> A. I couldn't tell you.
> Judge Kraushaar: Did you do it?
> The Witness: No sir. If I did I don't remember it.
> * * * * * * *
> Q. Would there be any purpose in your doing it if you did it?
> A. There wouldn't be no purpose in me putting it there . . .

68. Thorburn also conveyed a false impression that Whitman had been represented by an attorney, Aubrey Gilbert.[26] Thorburn testified that during one of his conversations with Whitman, he (Whitman) mentioned that his attorney was 'Aubrey' and that Thorburn knew he meant Aubrey Gilbert; that Whitman volunteered that he was going to get in touch with his attorney; and that he (Whitman) had called Aubrey Gilbert in early May and obtained Mr. Gilbert's advice on the validty of the option.

69. Mr. Whitman testified on the same subject. Aside from the brief help Aubrey Gilbert gave him when Whitman was searching for a copy of the option at the Carroll County Courthouse in April 1970 (T. 447–448), he testified that Aubrey Gilbert was not his attorney. At T. 497, the following colloquy took place:

> Q. When Mr. Thorburn brought this piece of paper to you and asked you to sign it did you show that to Mr. Gilbert?
> A. I didn't show Aubrey nothing.
> Q. In other words, after——
> A. He just done me a favor, sir. I was coming out of there [the Carroll County Courthouse] and coulda't find nothing. I didn't know where to hunt for it.
> Judge Kraushaar: Who was doing you a favor, Mr. Gilbert?
> The Witness: Mr. Gilbert. I just asked him would he help me find that . . .
> Q. Is that the only connection that Mr. Gilbert had with this whole affair, when he looked it up that first time?
> A. Yeah, as far as I know. I mean, I've always counted Aubrey as my friend, but I never had no dealings with him.

70. Not only did Mr. Thorburn submit a counterfeit affidavit to the Commission, and not only are there serious questions concerning the completeness and accuracy of that statement, but Thorburn's testimony regarding his role in this matter is considered to have been evasive, misleading, and less than candid in other respects than those considered above. Thus, Thorburn first testified that he had had *two* meetings with Whitman regarding the availablity of the transmitter site land, and that the initial meeting had taken place in March or April 1970 (T. 256–260). He then changed his testimony to indicate that the initial meeting had taken place in May of 1970 (T. 261). Then he admitted, under questioning by the Presiding Judge, that the original meeting could have been even later than May 1970 (T. 262–263). Then Thorburn changed his testimony again and indicated that there were *at least two* conversations between Whitman and himself (T. 272).

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[26] Aubrey Gilbert entered an appearance on behalf of Faulkner Radio, Inc. (T. 50, 51, 440). Faulkner, in its transmittal letter of February 7, 1973, had indicated that it would call Aubrey Gilbert as a witness. Subsequently, Faulkner indicated that it would not do so (T. 313).

Thorburn then changed his testimony again and testified that there were *three* conversations between Whitman and himself and that all three of these meetings had taken place within a few days of each other during the month of May 1970 (T. 273–275, 336, 338–339, 341–342). Still later, Thorburn changed his story once again, and testified to a *fourth* meeting between Whitman and himself, and he further indicated that this fourth meeting took place within 60 days of the third conversation (T. 344–345).[27]

71. Thorburn first testified that it was during his first meeting with Whitman that he had asked Mr. Whitman to give his so-called affidavit saying the land was no longer available (T. 264, 336–338). He subsequently reversed that testimony and declared that it had been during the second meeting that he had asked Whitman for an affidavit (T. 338–340, 377).

72. In describing the first conversation he had with Whitman, Thorburn testified that he opened the conversation with Whitman by asking Whitman if the Johnsons were ready to build a radio station. He immediately recanted and testified that he (Thorburn) had opened the conversation by asking Whitman if he was still selling his land to the Johnsons. A little later Thorburn changed his testimony again and testified that he may not have initiated the conversation at all; *i.e.*, that Whitman may have initiated the conversation (T. 245–246; 257–58; 260–261).

THE AL COHEN MATTER

Background

73. As indicated above (para. 2), by Memorandum Opinion and Order released October 23, 1973 (43 FCC 2d 472), the Commission's Review Board granted a Faulkner petition to enlarge the issues and added an issue that has opened the door to a detailed inquiry into whether an individual named Al Cohen has, or had, a hidden ownership in Radio Carrollton; whether the Johnsons had been uncandid to the FCC concerning this matter; and, if so, to determine the effect on Radio Carrollton's qualifications.[28] It is pertinent, perhaps, to review at the outset what the record discloses regarding the way this subject was injected into the proceeding.

74. During the very first prehearing conference in this proceeding, as has been noted, the Presiding Judge stressed that, due to the factual background leading to the designation of the 'abuse of process' issues by the Commission, the demeanor of the witnesses could be significant herein; and that he was urging the parties to cast as much of their

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[27] At one point Thorburn admitted that his initial conversation was fairly important since part of his Petition to Deny was predicated on that conversation (T. 263). Compare with T. 379, where Thorburn stated that he had not realized that the Whitman incident was eventually going to be an issue herein.

[28] Commission hearing procedure splits control over the conduct of hearings between the Commission's Review Board and the Administrative Law Judges (who, in the first instance, must determine the probative worth and materiality of evidence) by vesting virtually exclusive jurisdiction over petitions for amendment of the issues in the Board. It is believed that had the Board been forewarned in the pleadings the parties submitted to it of significant facts developed during the further hearings herein, it would *not* have added such an issue. In all events, the Board is a reviewing body primarily and is not in the same position as the Presiding Judges to ferret facts from charges and allegations by interested parties. In the present instance, the Board's piecemeal enlargement of the issues, without having the benefit of the completed hearing record on the issues designated by the Commission before it, has unnecessarily delayed the resolution of this already protracted proceeding by some six (6) months, the Presiding Judge believes.

direct cases as possible into written form: *that they make full and adequate disclosures of all relevant facts in advance of hearing;* and that each applicant do his best to help break the deadlock that caused the Commission to include the 'abuse of process' issues. Notwithstanding this admonition and its clearly stated purpose during his oral testimony, Mr. Thorburn repeatedly alluded, for the first time, to an alleged conspiracy between the Johnsons and an ex-employee of Faulkner, Mr. Al Cohen.[29] Among other things, he charged that Al Cohen had a hidden ⅓ ownership interest in the Radio Carrollton application at the time he was still employed by Station WLBB. He further suggested that Al Cohen had stolen documents belonging to Station WLBB and had made them available to the Johnsons.

75. Recognizing that Thorburn's testimonial allegations were not only largely hearsay but that they were beyond the scope of the designated issues, the Presiding Judge struck all references to the Al Cohen affair in Thorburn's testimony (T. 141, 210–212, 214–215, 217). However, if this subject could have been deemed relevant at all at the time, it might have been urged that it was pertinent because it also developed during the course of the hearing that, although Thorburn had had the alleged information in his possession since the spring of 1968, he deliberately refrained from making a full and adequate disclosure of the facts in advance of hearing pursuant to the prehearing ruling, *supra*, of the Presiding Officer. One could also observe that undisputed evidence indicates that Mr. Thorburn had asked Al Cohen to execute a covenant not to compete in the Carrollton market for a 5-year period and that Cohen had refused. It is thus apparent that, despite the effort of the Presiding Judge, in advance of the hearing, to encourage the parties to eliminate surprises by making full disclosures in advance, for tactical reasons obviously having little or no bearing on the objective of bringing out the truth, Faulkner had elected to spring the so-called 'Al Cohen Affair' during the hearing for the first time. It is deducible, moreover, if it is true as Thorburn had asserted that he had tried to obtain Cohen's signature on a covenant not to compete, that Thorburn was indeed concerned about competition in the Carrollton, Georgia market and that his testimony herein to the effect that he had not been trying to keep competition out of Carrollton (T. 283) was given either with reckless abandon and disrespect for the truth or that it was knowingly false. The Presiding Judge subsequently modified his ruling striking the evidence on the Al Cohen Affair by holding that it could be considered to the extent that it may bear upon Thorburn's state of mind at the time he filed the Faulkner petition to deny, on June 18, 1968 (T. 566–567).

76. Next, Faulkner has urged that Thorburn's assertions as to a hidden ownership in Radio Carrollton by Al Cohen and his related charge concerning the stolen articles were proper rebuttal testimony, but such contentions were rejected by the Presiding Judge. Nevertheless, it should be noted that Thorburn's testimonial innuendos and charges led to reaffirmations by both the Johnsons, from the witness stand, of the ownership representations they made in the Radio Carrollton application, *i.e.*, that each of them is a 50% owner and that there are no other documents, instruments, contracts or understandings

[29] Al Cohen terminated his employment with Faulkner Radio, Inc. in late June 1968.

relating to ownership. And the Johnsons have indicated, further, that Mr. Cohen had been a client of the Johnson law firm and that they had asked him general questions about the filing of applications; that Cohen had given them some advice on how to meet certain application requirements; that they had even gone so far as to discuss Cohen's being General Manager, if and when Radio Carrollton's application was eventually granted; and that they had discussed with Cohen the possibility of including Al Cohen in the partnership at some unspecified future date. But the Johnsons also swore that no agreement was ever reached; that no definite arrangements were ever arrived at; and that they had not even held out any promise of future employment to Mr. Cohen.

The Undisputed Facts

77. With the above-described background already a matter of record—though none of the litigants chose to stress it in detail before the Board—the Review Board was nevertheless induced to believe, evidently, that a genuine question of disputed fact existed, because of the gossipy affidavits of several individuals that Faulkner had submitted in support of its petition to enlarge. The further hearing sessions required by the injection of the new issue have indeed opened a veritable Pandora's Box of conflicting testimony and resulted in further delays in the termination of this already protracted case. Thus, each of the parties has perceived a need to summarize, *in extenso*, the testimony of each such witness in its supplemented proposed findings of fact and conclusions of law, thereby extending the length of such pleadings almost to the same number of pages submitted originally as part of the initial filings in this proceeding. The Presiding Judge does not believe that it serves a particularly useful purpose to burden this record further with such minutely detailed summaries of testimony in this Initial Decision. The summaries are a matter of record, of course, and the parties are free on review under the Commission's rules of procedure, to draw attention by exceptions to 'failures to find' to any particular matter in these extensive evidential summarizations. Suffice it to state, predicated upon the record as a whole and his examination of the additional evidence and on the particular matters to be referred to hereinafter, the Presiding Officer remains satisfied that the Johnsons' version of the facts on the so-called 'hidden ownership' matter are creditable and essentially true and that there is basically no substance to the allegations and charges which led the Commission's Review Board to add the latest new issue herein.

78. For the most part the findings in paragraphs 79–101, inclusive, *infra*, are predicated on evidence that was not disputed:

79. During 1967 and until 1970, William P. Johnson and Hollis B. Johnson were law partners in Carrollton. They were interested in various business investments in 1967 and thus on November 20, 1967, they filed with the Commission an application for construction permit for a new standard broadcast station at Carrollton. In this application, and in all subsequent filings with this Commission, the principals represented that they were equal co-owners of Radio Carrollton, and that no other parties had any ownership interest in that application.

80. Mr. William P. Johnson is a resident of Carrollton, and practices law there. He has been a member of the Bar of the State of Georgia

since 1957. He is a member of the American Bar Association, the Georgia Bar Association, and the Carrollton Bar Association. He is the county attorney for Carrollton and Heard Counties in Georgia. His clients include the Peoples Bank in Carrollton, the Commerce Bank of Bowden, Georgia, West Georgia Production and Credit Association, the Georgia Power Company and he represents the Federal Land Bank in 18 counties in Georgia.

81. Mr. Hollis B. Johnson also resides and practices law in Carrollton, and has been a member of the Georgia Bar since 1964. He belongs to the Carroll County Bar Association, the Georgia Bar Association, and is admitted to practice before the Federal Court, the Georgia State Supreme Court, the Georgia Court of Appeals, and the Georgia Superior Court. The Loyd Madden episode, *supra*, was the only instance where a complaint had ever been filed against him. Clients of Hollis B. Johnson include the Peoples Bank, the Federal Land Association, West Georgia Production and Credit Association, and Richard's Lumber Company. He is the recording judge for the city of Whitesburg, Georgia. He has acted as executor under court order, which has placed him in a fiduciary relationship with the court. He performs "*pro bono*" work.

82. Mr. Albert M. (Al) Cohen is currently employed at Station WACX, Austell, Georgia, as station manager, with an option to purchase a minority interest in that station. He has been with that broadcast station since July of 1968. Prior to that time, from 1966 to 1968, he worked for Faulkner Radio, Inc. at broadcast stations WLBB and WBTR(FM) in Carrollton as salesman and operations manager. At that time he was in his mid-twenties. During this period of employment until July 1972, he had been married to the present Sally Barton who prepared an affidavit dated May 17, 1973 and testified in this proceeding. Mrs. Barton's present husband is David Barton, presently a salesman at Station WTJH who also gave testimony in this case, and whose affidavit of May 17, 1973 is in evidence.

83. Other witnesses who appeared and gave oral testimony during the new phase of this case were Robert Thorburn, vice president and manager of Station WLBB, Jack Kirk, presently the Station WLBB station manager, Dan Turner, not currently full time in the broadcasting business, and Norman and Vivian McGhee, personal friends of Al Cohen and Mr. Thorburn, who are residents of Carrollton. Mr. McGhee is presently maintenance engineer for Station WLBB. Others include Al Cohen and Radio Carrollton principals, William and Hollis Johnson. John Lyons, another former Faulkner employee, supplied an affidavit dated June 15, 1973 which Faulkner attached to its petition to enlarge, filed June 27, 1973, but was not called as a witness.

84. With respect to Al Cohen, the record discloses that he has worked in radio since the year 1960, on a full time basis since 1964 and that he is now General Manager of Station WACX. It is shown that Cohen had an interest in becoming an owner or part owner of a broadcast facility for a considerable period and that in furtherance of this ambition he would make rudimentary frequency searches utilizing *Broadcasting Yearbook*, road maps and rulers and would discuss his findings with various acquaintances in radio.

85. During 1966 Mr. Cohen came to be employed by Faulkner at WLBB-WBTR(FM) as a salesman and FM operations manager. On July 9 of that year Cohen wrote a letter to Mr. Serge Bergen, consulting radio engineer and to other such consultants inquiring about fees and procedures to be followed in applying for a broadcast station construction permit before the FCC. Mr. Bergen replied by telephone and mail but nothing further came of this for a period of time.

86. Mr. Cohen became a client of Hollis Johnson in 1967. Their discussions would often include the business of commercial radio broadcasting, which was of interest to Mr. Johnson as he and William Johnson were looking for investment opportunities. Mr. Cohen informed Mr. Johnson that a consulting engineer had to be engaged to determine if a frequency was available for a particular city. Mr. Cohen had thought or heard that 1330 kHz might work. To confirm this, he recommended Serge Bergen, since Mr. Cohen had been favorably impressed with Mr. Bergen from his prior contact.

87. Sometime prior to June 22, 1967, at Hollis Johnson's request, Mr. Cohen placed a call to Mr. Bergen from the Johnson and Johnson Law Offices, and introduced the Johnsons to Mr. Bergen. Hollis Johnson then indicated his interest to Mr. Bergen in applying for a radio station in Carrollton. Mr. Bergen understood that the Johnsons were to be the applicant. Following this call, Bergen had no further contact with Mr. Cohen until June 1971. The Johnsons thereafter engaged the services of Mr. Bergen to determine the availability of a frequency and to prepare the engineering portion of their application. Mr. Bergen also suggested Samuel Miller as the legal counsel for Radio Carrollton. All bills were sent to the two Johnsons, who paid them on a 50–50 basis. Mr. Bergen was advised that each was a 50% owner. Hollis Johnson obtained the 301 forms from the FCC on Bergen's advice.

88. In performing the frequency search for the Johnson's, Mr. Bergen ascertained that field measurements would be required to show that 1330 kHz would be available in Carrollton. He also arranged with another consulting engineer, Pete Johnson, to have someone go to the Carrollton area and make these measurements. Don Pauley, an employee of Pete Johnson, went to Carrollton for that purpose in July of 1967. He spent two days there and was driven around part of the time by William Johnson. There was a period of a few hours when neither of the Johnsons was available, and one of the Johnsons asked Al Cohen, as a favor, to drive Pauley around during that period. Mr. Cohen was later reimbursed by Radio Carrollton by check for his expense incurred.

89. Also during that summer (1967), Mr. Cohen gave Mr. Hollis Johnson a folder containing various materials he had collected through the years relating to radio station applications. The material included *Broadcasting Yearbook*, CCA information sheets, and scraps of paper that had been discarded by Faulkner in the preparation of its application for other cities, among other items. These were given to the Johnsons for whatever use they might be to them in determining what was involved in going ahead with an application.

90. Al Cohen met with Hollis Johnson a number of times during the summer and fall of 1967. He was aware admittedly that the frequency could be used in Carrollton, and that the Johnsons were still interested

in applying for a station, although he did not know when, if at all, they would file an application. However, he told Mr. Hollis Johnson that if the Johnsons should obtain a station, he would be interested in managing it and in becoming a part owner. Admittedly, he even went so far as to prepare a proposed agreement to this effect (an original with two copies), which he had presented to Hollis Johnson. The document had spaces for the signatures of Mr. Cohen and both Johnsons. The document was short and its exact terms, at the present date, cannot be stated precisely. But it was undated, apparently, and no dollar figure was seemingly mentioned. It seems (according to his version at least) that Mr. Hollis Johnson, moreover, had refused to execute this paper stating that such an agreement would be premature since the Johnsons had no construction permit and did not know whether they would ever get one. It seems (also without dispute) that Mr. Johnson gave the matter such summary consideration that he had not mentioned the existence of this paper to his partner, Mr. William Johnson. Nor did he keep a copy. Al Cohen took the document home and filed it away among his papers in his bookcase. He also had other documents prepared by the Johnsons, such as wills, among his papers.

91. On one visit to Mr. Hollis Johnson, Al Cohen happened to have his portable typewriter with him. Mr. Johnson mentioned that he (Johnson) often wanted to work at home, but that he did not have a typewriter there. The office typewriters were large, with legal size carriages, and hence not convenient to take home. Mr. Cohen offered to lend him his portable typewriter to take home. Johnson did eventually borrow Mr. Cohen's typewriter and used it while preparing a number of the Radio Carrollton exhibits attached to the original application.

92. The Radio Carrollton application was filed with the Commission on November 27, 1967, and the required legal notice was placed in the Carrollton weekly newspaper. The news editor of the paper, Mr. Bray, was a friend of Al Cohen and he telephoned Cohen to inform him of the notice the day before the paper was published. Cohen then went to see Mr. Hollis Johnson to borrow the file copy overnight. Johnson agreed and Cohen took the application with him and made copies of various portions, including the coverage maps. He very likely had the application or copies of it with him at his desk at Station WBTR, and later at Station WACX, and it may have been seen by Messrs. Turner, Kirk and Barton. Soon thereafter, during the end of 1967 or early in 1968, Mr. Cohen boasted about his role in the application to Messrs. Kirk, Turner and Norman McGhee and implied that he had a guaranteed position with the Johnson station when it would go on the air. He also seems to have implied that he would want Kirk and Turner to work for him at that station. Mr. Kirk thus testified herein that Cohen had told him that he (Cohen) would have an ownership interest, but Turner testified that Cohen had told him that he would only be the manager. Neither Kirk nor Turner advised Mr. Thorburn of what Cohen had told them until the spring of 1968 and were not asked for affidavits until December 1969.

93. While working at Station WBTR, Al Cohen would often (two or three times a week) visit with Mr. and Mrs. McGhee whom Cohen considered to be good friends. Beginning in the fall of 1967, he told Mrs. McGhee of the Radio Carrollton application and of his aspira-

tions. There was no evidence whatever, however, to indicate that the Johnsons had authorized Cohen to make such representations: nor did the Johnsons, apparently, even know about Mr. Cohen's boasts.

94. During the spring of the year 1968, Mr. Robert Thorburn became concerned that Al Cohen might leave his station and go with the Radio Carrollton station once it went on the air. He therefore asked Cohen (sometime during May of that year) to sign a covenant not to compete for five years. Cohen returned with a counteroffer, agreeing to sign the covenant if Faulkner would grant him guaranteed raises during that period. Cohen apparently believed he would be earning that much anyway, since he had received a commission on sales and sales were improving, but he wanted something in return for signing such a covenant. Thorburn refused Cohen's counteroffer, and soon thereafter, in July of 1968, Cohen's employment at Station WBTR was terminated and he then joined Station WACX, Austell, Georgia. Cohen sued Faulkner for commissions allegedly due him when he left Station WBTR. He did not immediately relinquish his place of residence, nor his living quarters in Carrollton, because he was renting an unfurnished house there and had no better place to store his furniture. Also his wife at that time did not want to move with him to Austell.

95. Faulkner filed its petition to deny the Radio Carrollton application in July of 1968.

96. Cohen remained in contact with the Johnsons after leaving Station WBTR and he mentioned the progress of their application in a letter to Mr. Kirk on July 27, 1968. Having been denied an ownership agreement with the Johnsons, he evidently hoped to create a "moral" obligation on their part to hire him if they received a grant (T. 1056, 57). Thus, during June of 1971 he took photographs of a new site proposed by Radio Carrollton in an amendment to its application filed November 1, 1971 and mailed them to Mr. Bergen. He was reimbursed for his expenses by a check dated June 5, 1971.

97. During the early part of 1971, while the Radio Carrollton site was still fluid, Mr. Hollis Johnson considered transferring his interest in the partnership to Mr. Fred Hutchins, President of the Peoples Bank. Hutchins, while considering the possibility of becoming a partner had accompanied Mr. William Johnson on a visit to Mr. Whitman, *supra*, whose land was then being proposed as the transmitter site. Hutchins was informed that the interest he would be purchasing was to be a one-half interest. However, Mr. Hollis Johnson decided not to withdraw from the partnership and therefore nothing came of the discussions he had had with Mr. Hutchins on this matter.

98. In addition to the site photographs discussed above, Al Cohen assisted the Johnsons in the preparation of the Radio Carrollton amendment filed February 2, 1973, dealing with community composition and ascertainment of needs and problems. He had recently done a community profile of Austell and felt he understood what was required in this submission.

99. On January 1, 1971 Messrs. William and Hollis Johnson separated their law practice while maintaining their relationship with

Radio Carrollton. By letter dated January 19, 1972, Mr. Hollis Johnson asked Mr. Bergen for copies of all his statements. In so doing he referred specifically to his "one-half interest in Radio Carrollton" and assured Bergen that "I will see to it that my liabilities for one-half of these expenses will be paid to you immediately."

100. During May or June of 1972, Al Cohen and his wife separated and decided to seek a divorce. They had been having difficulties from the beginning of their marriage in 1965 and Cohen had been seeing Mr. Hollis Johnson in this regard for at least four years. Soon thereafter, Cohen mentioned the divorce to Mr. Dave Barton, who was then working under him at Station WACX, and said that he (Barton) and Sally (Cohen) were free to date. The conversation took place in Cohen's office at the station. Immediately thereafter Barton left Cohen's office and entered a studio at the station in which telephone calls to or from the station could be monitored. Barton overheard a conversation between Mr. Cohen and Mr. Hollis Johnson wherein Cohen had told Johnson of his decision to seek a divorce. Toward the end of the call, Cohen mentioned that he still had a copy of the draft agreement that he had presented to Hollis Johnson in 1967, but had not been signed. Johnson evidently told Cohen to destroy that paper, since he felt Faulkner could use it to further delay the grant of the Radio Carrollton application if it should come to light, even though it was not signed and had no validity. By this time, indeed, Mr. Johnson was aware that Faulkner had filed a number of papers with this Commission which asked the Commission to deny the Radio Carrollton application and included attacks upon his professional character as a member of the Bar and, consequently, that Faulkner was trying to further delay the grant of Radio Carrollton's application

101. There is conflicting testimony as to who first mentioned the agreement during the telephone conversation—Johnson or Cohen. Mr. Barton testified that Johnson brought up the subject, whereas Johnson and Cohen both testified that Cohen had mentioned it first. However, the Cohen's divorce became final July 5, 1972 and on the same day Barton and Sally Cohen were married. Barton was immediately discharged from Station WACX by Al Cohen.

THE CONFLICTING TESTIMONY

102. As indicated (para. 76, *supra*), there is no intention here to provide, or to repeat, the kind of detailed summarizations the parties have submitted in their respective supplemental proposed findings of the testimony, conflicting as it has been, of the parade of witnesses who have testified in the reopened phase of this case. However, in the interest of stressing the reasons why the Presiding Judge finds this testimony and other evidence supplied by or on behalf of the Johnsons to be worthy of belief while rejecting the seemingly contradictory or conflicting assertions of Faulkner's witnesses, some elaboration is considered to be called for.

103. First, it must be emphasized that Faulkner's witnesses evidently relied upon braggadocio by Al Cohen, or on the kind of thing that would, under different circumstances, be characterized as gos-

sip, or they had an interest in doing Mr. Cohen in, or they displayed other indications of bias or malice against Cohen. Second, there is not an iota of proof, either directly or circumstantially, linking the words these persons may have heard Mr. Cohen speak to a legal relationship of Cohen with the Johnsons, both of whom have been established by the evidence as esteemed members of the Bar and as honorable men, and both of whom have supplied all the financing for the prosecution of the Radio Carrollton application. Third, the so-called agreement, *supra*, that Mr. Cohen drafted was patently a self-serving paper that had no legal status or inception because there is no convincing evidence to demonstrate even a probability that it had been either signed or executed or approved or assented to by either Mr. Johnson. Indeed, absent independent cogent evidence indicating that the Johnsons had given any sort of approval, or assent, to an agreement with Cohen that purported to convey to the latter anything specific in the form of an ownership interest in the applicant, it is ludicrous, almost beyond belief, that the Review Board could have relied on such drivel as Mrs. Barton's "affidavit" in the first place, as the basis for adding an issue which has set the resolution of this case back for a period of up to six (6) months.[30]

104. To be specific, Sally Barton, as has been noted, the ex-wife of Al Cohen and now the wife of a man who had been discharged by Cohen from employment at Station WACX, was disclosed to have been having support problems involving the support and custody awarded by the divorce court for hers and Cohen's children. Both she and her husband, Dave Barton, could well have been motivated, therefore, by spitefulness or malice against Mr. Cohen. In any event, although she claimed to have read an agreement, dated sometime in the year 1967, consisting of 2 or 3 sentences, signed by Cohen and the two Johnsons, for a 3-way partnership in Radio Carrollton, her testimony was internally confusing and, at several points, contradictory. For instance while, on the one hand, Mrs. Barton testified that Cohen had told her he wanted to keep the so-called agreement a secret because it was illegal to have such a silent partnership, and at another point that he wanted to keep it a secret because of his employment with Mr. Thorburn, on the other she admitted that her parents, friends, etc., practically everyone, knew about the so-called secret agreement, because Cohen told everyone. Also, she conceded that Cohen could have just been bragging when he told people about his alleged ownership interest in Radio Carrollton.

105. For his part, Sally Barton's husband, Dave Barton, also gave testimony that was confusing or contradictory, virtually all of which related to conversations or alleged dealings with Al Cohen and a conversation he claimed to have overheard. For instance, Barton testified, among other things, that he had been thumbing through a folder on Al Cohen's desk and came across documents containing the names of the Johnsons; that he specifically asked Cohen if he was going to be a one-third owner of Radio Carrollton and who the Johnsons were; and that Cohen replied that Thorburn wanted to prove Cohen's con-

[30] The Review Board of course was not in a position to ask questions. As essentially a reviewing authority it could only rely, as a practical matter, on the papers the parties filed in resolving the request for enlarging the issues.

nection with Radio Carrollton, and as long as Thorburn did not know about it, it was all right. Yet Barton also testified that Al Cohen never told him he had an agreement with the Johnsons and he admitted that he himself had never discussed the matter with either Mr. Johnson. Also, while Barton testified that he had accompanied Cohen to Carrollton, at Cohen's request, and that Cohen met there separately with the Johnsons and had met William Johnson in a parking lot, the latter explicitly denied having met Cohen in any parking lot. And while Barton testified as to a telephone conversation he had apparently overheard between Cohen and Hollis Johnson in May of 1972, there is other testimony (of Cohen and Johnson) which make this conversation appear to have been a lot less sinister than Barton made it out to be. In fact, as the Bureau pointed out in its Supplemental Proposed Findings, para. 10, Hollis Johnson's explanation of this conversation, that "knowing that Robert Thorburn had attacked his character . . . and placed numerous roadblocks in the way of a grant of R.C.'s [Radio Carrollton's] application, and having heard that Thorburn was trying to tie Al Cohen into the R.C. application, indicated to Cohen that he would prefer it if Cohen would destroy it" [*i.e.*, the so-called agreement in Cohen's possession], was quite reasonable and believable under the circumstances.

106. Other witnesses testified against the Johnsons and Radio Carrollton. Mr. Norman McGhee, the owner and operator of an electronic service business, who does business with Faulkner Radio, rendered a "maze of confusing statements" (Bureau's Supplemental Proposed Findings, para. 39), except that he did manage to corroborate Al Cohen to the extent that Cohen, he averred, never told him that he had a present ownership in Radio Carrollton, but only that he would acquire a ⅓ interest if and when the Radio Carrollton application may be granted. Mrs. McGhee, Norman McGhee's wife, testified that all her husband could know about Cohen's so-called agreement was what she had told him. She indicated, moreover, that Al Cohen never told her he was to be a ⅓ owner but only a part owner. Further, Mrs. McGhee's testimony consisted almost entirely of asseverations of what Al Cohen had in fact made statements to her about an alleged ownership interest he had in Radio Carrollton. This kind of uncorroborated gossip is hardly worthy of being dignified as proof of the existence of such an agreement. Nor does the fact that it got into the record without objection render it inherently more worthy of credence.

107. Similarly, the testimony of Jack Kirk and Danny Turner was predicated entirely on what Al Cohen allegedly had said to them at one time or another or, in the instance of Kirk, in having allegedly seen Cohen working on what he thought was Radio Carrollton's application; or in Kirk's instance, again, in being shown a copy of the application by Cohen after legal notice of its filing had been published. Neither witness was able to provide proof beyond Cohen's boastfulness, of course, of an actual connection of Cohen with the two Johnsons in the Radio Carrollton application. Again, as in all other instances cited above, there was an utter failure of proof to warrant considering anything Mr. Cohen may have spoken in the course of his dealings with these witnesses and the others as being "binding" on either of the two Messrs. Johnson. Indeed, the evidence, such as it is, at most merely

indicates that the ambitious Al Cohen had been helpful to the Johnsons in connection with the preparation of the Radio Carrollton application in the hope that they might reward him for his efforts some time in the indefinite future.

108. Finally, as a wrap-up of this entire matter, the Presiding Judge would hasten to state his complete concurrence with the Broadcast Bureau's analysis at para. 62–70, inclusive, of the Bureau's Supplemental Proposed Findings, that there is "extrinsic" evidence supporting the view that the Johnsons have been blameless as to this entire matter, *e.g.*, the earlier testimony herein showing that, *ante litem motam*, Mr. Hollis Johnson held himself out to a third party (Fred Hutchins) as having a *half interest* in Radio Carrollton; the reference by Al Cohen himself in a letter of July 27, 1968 to Jack Kirk, to the "Johnson and Johnson application" without any hint whatsoever that he (Cohen) had any ownership interest therein, and, most importantly, Mr. Thorburn's utter disregard for, and carelessness in dealing with, important facts.

CONCLUSIONS

109. The most conspicuous aspect of the record compiled in this proceeding is the abundant and persuasive evidence it contains indicating that Faulkner Radio, through its Vice President Thorburn, embarked on an apparently calculated campaign to mislead and deceive this Commission concerning a competing applicant, Radio Carrollton, for the purpose of thwarting or delaying the initiation of a competing broadcast service in Carrollton, Georgia. The gravity of this element of the case may not be glided over, for it is long recognized as of the utmost importance to a regulatory body like the Federal Communications Commission, with no army of investigators or information gatherers readily at its disposal, that it be able to rely absolutely upon meticulous accuracy and candor from those who are licensed by it as well as from the applicants who seek such valuable privileges as licenses to operate broadcast facilities on frequencies that belong to the public. It is one thing for the Commission to depend on those who have private economic interests at stake, as "private attorneys general", to bring relevant information to the Commission's attention bearing upon the fitness of a potential business competitor, in the public interest, to be licensed by this Commission.[31] It is something else for such a "private attorney general" to set himself up as a psalm-singing purveyor of gossip or distortions for his own invidious purposes, *e.g.*, in order to throttle a potential business competitor. It is just for such reason that it has long been the law that this Commission has the right to treat the mere "fact of concealment" by a licensee or applicant as more significant, even, "than the facts concealed".[32] *Cf.* Decision of the Review

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[31] *See Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.Ct. 693 and the line of cases following, *e.g.*, *Carroll Broadcasting Company* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 Fed 400, in regard to the "party in interest" concept. "Parties in interest" have frequently been labelled "private attorneys general" or, if not, they have been clothed with the opportunity and the authority to act as attorneys general in the protection of the public interest. *Cf. Office of Communication of United Church of Christ* v. *FCC*, 123 U.S. App. D.C. 328, 359 F. 2d 994 (1966); and *see Re. Wisconsin Broadcasting System, Inc.*, 10 RR 1253, 1258 (1954).

[32] *Federal Communications Commission* v. *WOKO, Inc.*, 67 S.Ct. 213, 215, 329 U.S. 223, 227 (1946). The Supreme Court observed that "The willingness to deceive a regulatory body may be disclosed by immaterial and useless deception as well as by material and persuasive ones . . ."

Board released December 11, 1973 in *Re Herbert L. Rippe*, Docket No. 19270 (FCC 73R–404), para. 4. It is indeed unfortunate that this basic principle of administrative law, though often repeated and widely circulated, has not yet fully penetrated to all applicants and licensees.

110. It seems superfluous to do as the Commission's Broadcast Bureau has done (under the heading of "Proposed Conclusions of Law", pages 55 *et seq.* of the Bureau's Proposed Findings of Fact and Conclusions of Law), to reiterate in these conclusions of law, even in summary, every facet of Radio Faulkner's conduct that convicts it as an unworthy applicant and licensee. It should suffice but to note the Presiding Administrative Law Judge's concurrence with the Bureau's view that Faulkner, the party that asked for a misrepresentation issue against Radio Carrollton, was itself responsible for distortion of the facts in relation to the site availability matter; that the evidence is persuasive, as well as pervasive, regarding Mr. Thorburn's wanton disregard of, and indifference to, the need for accuracy and truth in giving testimony on the so-called Whitman site episode, as well as upon other matters; that it was at least circumstantially apparent that Faulkner, through Thorburn, tried, most irresponsibly, to stir up further enmity against the Johnsons by a disappointed former client of their law firm when Thorburn knew, or ought to have been aware, that the dispute with the client had previously been settled, by seeking, with the help of an "affidavit" and allegations in a pleading, to revive the subject before this Commission; and that the Hollis Johnson version of the crucial telephone conversation he had had with Thorburn on June 20, 1968 must be accepted as substantially accurate and therefore credible, while Thorburn must be held to have either been reckless with the truth or to have wilfully misrepresented the facts in his version.

111. One might freely acknowledge in the final analysis, that a "private attorney general" who happened also to be a potential business competitor, because of his axe-to-grind position as a "party-in-interest", has a particularly difficult burden to assume in relation to being truthful and accurate in bringing charges against his potential adversary before this Commission, not only for the reasons already cited, but likewise because of national communications policy to encourage and foster competition among broadcasters, and other mass communications media, in the dissemination of news and viewpoints. See *Associated Press* v. *United States*, 326 U.S. 1, 28 (1945). Obviously, if broadcasters are not held to the strictest standards of reliability and accountability, in informing this Commission about competitors and potential competitors, this policy can easily be subverted to the detriment of the public's interest.[35] Indeed, because of the potentiality for damage to the public trust, such lack of candor as has been established in the present case is to be condemned *without*

[35] Some may perceive irony in the fiercely "competitive" hearings that are sometimes waged before this Commission, to the extent that this adversary system of jurisprudence may operate as a discouragement, financial or otherwise, to those who might like to establish competitive broadcast facilities. Indeed, if the only benefit to be derived by the general public from this system is to improve the compensation possibilities for lawyers, one might legitimately question the sanity of the entire system. To make the system work as it should, it would appear to the Presiding Judge herein to be absolutely essential that government regulators keep in mind at all times that the Supreme Court in the *Associated Press* case was passing upon the beneficial effects *in the market place* of competition among the mass media and not upon the kind of competition among mere applicants in hearing cases before the regulators as an end in itself that one perceives in the present proceeding.

regard to the question whether a potential competitor was shown to have been actually delayed in having had its application processed by the Commission's staff due to improper tactics of the "private attorney general". Yet it ought to involve little imagination to conceive that another applicant in Radio Carrollton's place, with the pleadings that were submitted against it by Faulkner Radio, could easily have become discouraged and have tossed in the sponge long ago, long before the 5-year lapse involved herein between the date of filing of Radio Carrollton's application and its designation for hearing. Even without knowledge of the internal processes of the Commission's staff, inasmuch as evidence thereof has not been adduced, it is by no means conjectural or unreasonable to infer from the circumstances of record herein that the Petition to Deny, the eight "Supplements" thereto filed by Faulkner, the responses and oppositions that were evoked thereby, and the replies to oppositions filed with this Commission by Faulkner, were responsible in significant part for delays that have occurred in designating the application for hearing.

112. In the circumstances, the Commission had a clear right to expect Faulkner, at least during the hearing, to have fully and scrupulously documented by probative evidence the allegations and charges under the issues that it was responsible for having caused the Commission to frame against its adversary herein even though it was not assigned the burden of proof thereon.[4] To the contrary, the hearing has served but to demonstrate that Faulkner Radio has in fact dissembled, and that its effort to fault the "character" qualifications of the Johnsons has boomeranged. It may be said, finally, that there is nothing more precious and vital to a practicing lawyer than his 'good name'; that the Johnsons evidently are attorneys of some distinction in Carrollton, Georgia; and that the Commission, thus, has at least a presumptive basis for preferring the veracity of Mr. Hollis Johnson's testimony over Mr. Thorburn's, absent a persuasive justification to the contrary. In the present case, however, there not only was a lack of any justification but also there was a convincing indication, due to the inherent inconsistencies and his lack of attention to the need for telling the whole truth the first time around, and his evasiveness, to disbelieve and discredit Mr. Thorburn's version of the facts.

113. So that there may be no misunderstanding, it is determined, predicated upon the foregoing findings of fact and the evidence of record, as well as upon the Presiding Judge's observation of the witnesses, that Faulkner Radio, Inc. had filed its Petition to Deny, not for a praiseworthy purpose of bringing pertinent information concerning its adversary to the Commission's attention bearing on the public interest but instead for the invidious or underhanded purpose of delaying the processing of Radio Carrollton's application by the Commission and its staff (Issue 5, *supra*). And it is determined further (Issue 6, *supra*) that Hollis B. Johnson spoke the truth in his affidavit and explanatory testimony regarding the conversation he had had with Robert M. Thorburn on June 20, 1968, whereas Faulkner Radio, through its principal Mr. Thorburn, had misrepresented the circumstances of that crucial conversation for the apparent purpose

[4] Faulkner was afforded a reasonable opportunity to present rebuttal evidence, if it had any, to the evidence adduced by Radio Carrollton, as to all aspects of this proceeding.

of creating an impression favorable to its Petition to Deny and unfavorable to Radio Carrollton. Accordingly, it is concluded that, due to its demonstrated insincerity, the public interest cannot be served by granting Faulkner Radio's application for renewal of license herein.

114. It is now necessary to consider, briefly, the qualifications of applicant Radio Carrollton in accordance with issues 1–4, inclusive, *supra*.

115. Radio Carrollton has satisfied the showing required by the ascertainment-of-needs issue (Issue 1), for, as the above findings indicate, the Johnsons have secured the requisite demographic data for Carrollton, Georgia and for the proposed service area; they have utilized the data thus obtained in ascertaining the identity of persons in the community to interview; they have conducted such interviews both in Carrollton and in other communities in the proposed service area; and they have conducted both a 'community leader' and a general public type of survey. Furthermore, the Johnsons' surveys were conducted by them as 'principals' of their applicant, 85% of the interviews were face-to-face and the remainder telephoned, the survey forms were tabulated and evaluated, some 27 needs or problems were exposed, and Radio Carrollton promises substantial programming to meet such problems or needs. It is therefore concluded that applicant Radio Carrollton has satisfied completely the requirements specified by the Commission in *In the Matter of Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

116. With respect to the limited financial showing required of Radio Carrollton by Issue 2, *supra*, namely, to determine whether the loan commitments to the applicant by three named banks remain valid, and whether the Johnsons possess adequate current assets to finance their proposed station, the above findings indicate that the applicant, Radio Carrollton, has valid, up-dated loan commitment letters from the designated banks and that it has submitted current financial data as to both Radio Carrollton partners. The financial information as to the Johnsons shows clearly that they have more than sufficient current assets to finance the station as proposed by them.

117. As a consequence of charges by Faulkner Radio in one (actually the fifth) of its numerous supplements to its Petition to Deny, filed June 23, 1970, the Commission specified Issues 3 and 4, which prescribe an investigation as to whether Radio Carrollton had misrepresented the facts to the Commission concerning the availability to it of the O. S. Whitman tract as its proposed transmitter site; and whether the said applicant kept the Commission informed of substantial and significant changes regarding the continued availability to it of the Whitman tract, as required by Rule 1.65. As regards these matters, the facts established by the evidence of record are set out above (para. 53 to 72, *supra*) and consequently there is no real need for their repetition in detail at the present juncture. Nonetheless, for convenience it will be noted again that, predicated of course on the interpretation of the evidence, *supra*, of the Presiding Judge, it does appear that the Johnsons had been assured by Mr. Whitman, even after the terms of their written option had expired, that his land would remain avail-

able to them for a transmitter site until the Radio Carrollton application would be granted by the Commission. Indeed, it is persuasive, in the Presiding Judge's view, that, due to the comparatively high price the Johnsons had agreed to pay for this tract of real estate, seemingly both the optioner and optionee in effect had agreed informally to keep their arrangement in force indefinitely. Moreover, it seems that the first real indication that Whitman had changed his mind had actually not been conveyed to the Johnsons until they became aware of Whitman's so-called "affidavit" attached to Faulkner's supplement to its Petition to Deny. And the evidence indicates that after the Johnsons were thus notified, they proceeded forthwith to search for a new site and that it took approximately six months before they were successful. As soon as they did obtain a new proposed transmitter site, they amended their application (January 15, 1971) to reflect the new site. The Johnsons candidly admitted that they had omitted formally to notify the Commission promptly that the Whitman tract was no longer available because they were more interested in searching for and finding new property, and because they believed the Commission was already on notice, anyway, by the affidavit filed by Faulkner.

118. While it can be concluded accordingly that Radio Carrollton had failed to conform strictly to the provisions of Rule 1.65 by omitting to notify the Commission promptly as to the loss of its proposed transmitter site, such a "violation", if it can thus be characterized, was isolated, inadvertent and is adjudged to be of little or no decisional significance, in light of the fact that the Commission had already been put on notice by the affidavit Faulkner filed, but especially in view of Mr. Thorburn's misrepresentation of the Johnsons' position to Mr. Whitman which seemingly resulted in his securing an albeit incomplete statement from the latter adverse to the Johnsons.[35] Similarly, it must be concluded in the opinion of the Presiding Judge, that the Johnsons' testimony on the Whitman matter was open and candid, that their version of events successfully withstood the scrutiny of cross-examination, and that their oral testimony is consistent with their pre-designation affidavits and that it was corroborated at key points by Mr. Hutchins, the local bank president, and by Mr. Whitman himself. On balance, therefore, both Issues 3 and 4 are resolved herein favorably to Radio Carrollton.

119. Issues 3 and 4, however, ought not to be finally resolved without focusing some renewed attention upon Mr. Thorburn's role in connection therewith, since his lack of candor with respect thereto reflects not only upon the determination of the facts under these issues but upon

[35] Actually, Rule 1.65 prescribes, among other things, that "Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant *shall as promptly as possible and in any event within 30 days, unless good cause is shown*, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate . . ." (Emphasis in quote supplied.) Under the circumstances of the present case, it could have been urged that Radio Carrollton, having proceeded with diligence to locate a new site promptly after it learned of the unavailability of its old site, did not, in fact, disadvantage the Commission's processes, and that the oversight in notifying the Commission may be ascribed to the kind of unfair competitive tactics it has had to endure herein; therefore, that "good cause", in the language of the rule, was shown for exceeding the 30-day notification period. Also, Radio Carrollton did amend its application promptly when it found a new site. Compare *Vogel-Ellington Corp.* (WHOD), (Review Board decision), 41 FCC 2d 1005, 1010 and Concurring Statement of Board Member Kessler therein, 41 FCC 2d at 1012. In all events, as noted in the text, if Rule 1.65 is considered to have been violated by the Johnsons, by no stretch of the imagination could a conclusion that such violation was serious and disqualifying be justified.

the resolution of the so-called 'abuse of process' issues (Issues 5 and 6), as well. For, not only in terms of the phraseology of Issue 4 as has been noted, does it appear that the Johnsons have not misrepresented the facts to the Commission concerning the continued availability to them of the Whitman tract, but it appears instead that the party that solicited these issues, namely, Faulkner Radio, misrepresented the facts to the Commission.

120. Thus during the hearing it turned out that the so-called "affidavit" on which Faulkner had based its misrepresentation and Section 1.65 allegations against Radio Carrollton was not an affidavit at all.[36] It was Robert Thorburn himself who had prepared Whitman's statement. Moreover, he never had told Whitman that the document was going to be notarized. And Whitman had not signed the document in the presence of a notary as Faulkner had represented to the Commission in its Petition to Deny. In fact, Whitman was never administered an oath, and Thorburn admitted that the document was notarized in his own office sometime after Whitman had signed it.

121. When questioned by the Presiding Officer as to whether he did not realize that the submission to the Commission of such an unsworn paper as an "affidavit" was a misrepresentation to the Commission, Thorburn, a broadcaster of 14 years' experience and himself a notary public, indicated that he now realized this for the first time. It is hard to conceive a more persuasive illustration of Mr. Thorburn's carelessness with the truth than this, especially in the light of the information of record to the effect that Thorburn previously, as Faulkner Radio's Vice President as well as a notary, had notarized false affidavits on behalf of FM Station WBTR, Carrollton. Whether Thorburn's lack of candor with regard to the matter is characterized as "a wilful misrepresentation to the Commission", as the Broadcast Bureau recommends (Bureau's Proposed Conclusions, para. 20), or as a reckless and cavalier disregard of the need for complete candor in dealing with this Commision, is immaterial. In either instance, the Commission was, or could have been, misled, an explicit requirement of Rule 1.580(i) was fraudulently evaded, and Thorburn must be held, at least constructively, to have intended that the Commission believe he was submitting a sworn statement by Mr. Whitman. The Commission, as the Bureau points out, cannot tolerate deception, even 'useless deceptions', by those who come before it (especially by experienced broadcasters). *Cf. Federal Communications Commission* v. *WOKO, Inc.*, *supra*, para. 109 and footnote 32.

122. Mr. Thorburn's lack of candor was also exemplified by what appeared to be a calculated effort on his part to minimize the role he played in stirring up Mr. Whitman, and by his evasiveness and lack of attention to the need for being accurate in addressing the questions put to him concerning the number of times he had met with Mr. Whitman on the subject, starting with two such conversations and winding up with four. Thorburn seems also to have tried to convey an impression that he had dealt with Mr. Whitman at arms length because the latter had been represented by an attorney, whereas Mr. Whitman

[36] Under 47 CFR 1.580(i), allegations of fact set out in Petitions to Deny, except those of which official notice may be taken, ". . . shall . . . be supported by affidavit of a person or persons with personal knowledge thereof . . ." Thorburn, an experienced broadcaster, undoubtedly was aware of this, since he had previously filed a Petition to Deny in both the Slidell, Louisiana proceeding and in the instant proceeding.

testified subsequently that he had not been represented by an attorney in those dealings.

123. Overall, in the opinion of the Presiding Administrative Law Judge, the foregoing findings and conclusions, and the evidence of record viewed as a whole, clearly warrant an ultimate conclusion herein that a grant of Radio Carrollton's application for a construction permit to operate a new standard broadcast station in Carrollton, Georgia will serve the public interest, convenience and necessity, and that it should be granted. On the other hand, even though Faulkner Radio's application for renewal of the station license for Station WLBB at Carrollton, Georgia is not mutually exclusive with Radio Carrollton's (and under other circumstances, therefore, both applications might have been granted), it is concluded that the conduct of Faulkner Radio, by virtue of the lack of candor of its principal, Mr. Robert Thorburn and his misrepresentations regarding his telephone conversation with Radio Carrollton's Mr. Hollis Johnson (Issues 5 and 6), renders it unwise and contrary to the public interest, as a matter of policy and law, to grant such application. In connection with Faulkner Radio, it must also be concluded that its Petition to Deny (with eight supplements thereto over a 3½ year period) was undoubtedly filed with this Commission primarily for the purpose of causing delays in the processing of Radio Carrollton's application and thereby postponing the day when it might have to be confronted with competition in Carrollton, Georgia.[37] Under such circumstances, the Commission cannot possibly afford to place any semblance of an imprimatur on such a Petition to Deny, *i.e.*, without risking the encouragement thereby of other existing broadcasters to follow similar paths for the purpose of thwarting competition, contrary to often repeated national policy to encourage competition in the broadcast field. Indeed, in the opinion of the Presiding Judge herein, it should have a salutary effect, decidedly in the public interest, were the Commission in this proceeding to declare that it affirmatively and definitely disapproves and denounces the kind of conduct pursued by Faulkner Radio in this case, in denying Faulkner's renewal of license application.

Accordingly, IT IS ORDERED, That, unless a timely appeal from this Initial Decision is taken by a party (*i.e.*, 30 days from date of release unless extended), or the Commission reviews the Initial Decision on its own motion before the expiration of the 50-day period from the date of release hereof prescribed by Section 1.276 of its rules,[38] the application herein of William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton for a construction permit to operate a new standard broadcast station on the frequency 1330 kHz, 500W, Day, at Carrollton, Georgia, is hereby GRANTED; and

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[37] Compare the Commission's related policy in dealing with so-called "strike" applicants, whose purpose it also is to impede, delay or obstruct the grant of another application, as articulated in *Re Revocation of the Licenses of Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3; 17 RR 2d 647, 650 (1969): "Any licensee who is found to have participated in the filing of an application, one of whose purposes is the obstructing . . . etc. a grant of another application, places in jeopardy the authorization for the existing station which is the intended beneficiary of the 'strike' application. . . ." Whether the tool for achieving such obstruction happens to be a "strike" application or only a false or inaccurate supplemental "Petition to Deny" would appear to be immaterial in terms of the Commission's responsibilities under the Communications Act.

[38] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release date of the full text hereof, unless an extension of time is duly granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period, or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomees effective pursuant to paragraph (c) of Rule 1.276.

IT IS ORDERED FURTHER, That the application of Faulkner Radio, Inc. (WLBB) for renewal of the station license for Station WLBB on the frequency 1100 kHz, 1 kw, Day, at Carrollton, Georgia, is hereby DENIED, and, further, that the said licensee TERMINATE ITS OPERATION OF STATION WLBB at midnight of the thirtieth (30th) day following the date this Initial Decision becomes final, or as otherwise ordered by the Commission.[39]

FEDERAL COMMUNICATIONS COMMISSION,
DAVID I. KRAUSHAAR, *Administrative Law Judge.*

[39] See footnote 38, *supra.*

APPENDIX J

F.C.C. 73R-362

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, D.B.A. RADIO CARROLLTON, CARROLLTON, GA. For Construction Permit	Docket No. 19636 File No. BP-17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. For Renewal of License	Docket No. 19637 File No. BR-1431

MEMORANDUM OPINION AND ORDER

(Adopted October 18, 1973; Released October 23, 1973)

BY THE REVIEW BOARD:

1. The above-captioned applications were designated for consolidated hearing by Commission Memorandum Opinion and Order, FCC 72-1022, 38 FCC 2d 68, released November 21, 1972. Now before the Review Board is a petition to enlarge issues, filed by Faulkner Radio, Inc. (WLBB) (Faulkner) on June 27, 1973, seeking a hidden ownership and candor issue against Radio Carrollton.[1] More specifically, Faulkner seeks an issue to determine whether William P. Johnson and Hollis B. Johnson, doing business as Radio Carrollton, have failed to reveal the existence of a one-third owner in the application, Al Cohen, and whether they have been candid with respect to the ownership of the applicant.

2. Faulkner alleges that its petition is timely since the facts leading to its filing arose out of the testimony given by William P. Johnson and Hollis B. Johnson during the May 14, 1973, hearing in this proceeding.[2] Because this testimony allegedly, directly contradicts an earlier deposition by Al Cohen,[3] petitioner began investigating and allegedly discovered an undisclosed interest of Cohen in the Radio Carrollton application. According to Faulkner, Cohen deposed that he had never knowingly helped anyone prepare an application for a radio station in Carrollton, including the Johnsons, and that he did not know about their application until it was published or who had assisted them in preparing it. Although the Johnsons minimized Cohen's participation in the preparation and filing of the original application and de-

[1] Also before the Board for consideration are: (a) the Broadcast Bureau's comments, filed July 11, 1973; (b) opposition, filed July 11, 1973, by Radio Carrollton; and (c) reply, filed July 23, 1973, by Faulkner.

[2] Faulkner contends that its petition was expeditiously prepared after receipt of the transcript of the hearing on June 13, 1973.

[3] This deposition was taken in 1969 at a discovery proceeding arising out of a lawsuit Cohen, an ex-Faulkner employee, instituted against Faulkner for unpaid sales commissions he allegedly earned at the Faulkner FM Station WBTR.

nied any ownership interest in the application other than theirs, petitioner contends that they, nevertheless, testified to Cohen's involvement in the application at the May 14 hearing. Specifically, Faulkner avers that the Johnsons testified that Hollis B. Johnson had asked Cohen general questions about the Radio Carrollton application while preparing it, that Cohen had suggested the availability of a frequency to them and had recommended a consulting radio engineer they could hire, and that, furthermore, they had discussed the possibility of Cohen managing their station, as well as a possible future partnership for him. Faulkner contends moreover, that the supporting affidavits it has submitted contradict both the testimony of the Johnsons and the deposition by Cohen. In this connection, petitioner avers that each of the affiants,[4] all of whom know Cohen, state that Cohen either admitted or implied to them that he had an interest in the Radio Carrollton application.[5]

3. In opposition, Radio Carrollton contends that the petition is grossly late since it is based on facts available to petitioner for several years. In this connection, Radio Carrollton notes that Faulkner submits documents and affidavits dating back to July, 1968, and that those 1973 affidavits relied upon relate to purported conversation which occurred years ago. Moreover, Radio Carrollton contends, good cause has not been shown for the untimeliness. With respect to the merits of the petition, Radio Carrollton alleges that the Johnsons and Cohen expressly deny the existence of any ownership agreement regarding an interest by Cohen in the application. As further explanation, Radio Carrollton attaches an affidavit executed by Cohen in which he states that while he had prepared a partnership agreement which would have guaranteed him ownership participation in the Radio Carrollton application and a position as general manager of the station, the Johnsons refused to sign it. In his affidavit Cohen also states that, whenever he spoke with others of his relationship with Radio Carrollton's application, he did so without the Johnsons' knowledge or approval and he always referred to his association with Radio Carrollton as being prospective. Finally, Radio Carrollton argues that the affidavits submitted by Faulkner rely primarily upon impressions about remarks Cohen made regarding "his [own] hopes and aspirations" to participate in Radio Carrollton. The Broadcast Bureau supports granting Faulkner's untimely petition since it contains serious allegations, supported in particular by the Bartons' affidavits, which contradict testimony by the Johnsons, as well as ownership representations contained in Radio Carrollton's application.

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[4] Affidavits executed by Sally Barton, Cohen's former wife; her husband, Dave Barton, a onetime co-employee of Cohen at Station WACX, Austell, Georgia; Jack Kirk, a onetime co-employee of Cohen at WBTR-FM; Dan Turner and John Lyons, employees of Faulkner during the period Cohen worked for Faulkner; and Vivian McGee, an acquaintance of Cohen, are attached to the instant petition.

[5] Sally Barton states in her affidavit of May 17, 1973, that she has seen a signed partnership agreement under the name of Radio Carrollton between the Johnsons and Cohen in which Cohen had a one-third interest in the proposed station. David Barton states in his affidavit of the same date that Cohen admitted being a one-third owner of Radio Carrollton and that, furthermore, he once overheard a telephone conversation between Cohen and a person, who he believes was Hollis B. Johnson, in which a written agreement was discussed. The other affiants state that Cohen had admitted to them that he had an agreement to be a part of Radio Carrollton and/or manage the station.

4. Faulkner, in reply, reaffirms that its petition is timely, maintaining that it was only after the conflict in testimony between the Johnsons and Cohen became apparent and it obtained the affidavits of the Bartons, after the dissolution of the Cohen marriage, that it was possible for Faulkner to meet the burden of sustaining its petition. In specific response to the opposition, Faulkner challenges Cohen's statement that his written partnership agreement was never actually signed, arguing that if it had not been signed, it would not have been important enough for Hollis Johnson to have cautioned him to destroy it, as Cohen concedes he did in his affidavit. In any event, petitioner contends, Cohen's deposition, the Johnsons' testimony, and the affidavits petitioner submitted, continue to conflict with one another in spite of the fact that Cohen's affidavit attempts to reconcile the differences.

5. The Review Board agrees with the Broadcast Bureau that good cause has not been shown for the untimeliness of Faulkner's petition. Even assuming, as petitioner does, that the Bartons' affidavits provide a necessary link to Cohen's ownership in Radio Carrollton, petitioner has failed to satisfactorily explain why the information in these affidavits was not available earlier, since it involves matters which allegedly occurred several years ago. However, Faulkner's petition warrants consideration on its merits because it raises serious public interest questions. See *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 8 RR 2d 611 (1966). The allegations by Faulkner that Cohen admitted or implied to the several persons furnishing the affidavits supporting its petition that he had an interest in the Radio Carrollton application are inconclusive and do not, by themselves, justify the addition of the requested issue, particularly in view of the fact that Radio Carrollton, the Johnsons and Cohen steadfastly deny his interest. Moreover, there is no evidence, even if Cohen had made the remarks credited to him, that Cohen was expressing anything but his own aspirations to participate in Radio Carrollton. However, these circumstances, considered in light of the statements by Sally Barton claiming that she saw a signed copy of a partnership agreement between Cohen and the Johnsons, and by Dave Barton that he allegedly overheard Cohen and Hollis B. Johnson discussing the agreement, do raise a substantial question regarding possible undisclosed interest in Radio Carrollton by Cohen which warrants the requested issue. Radio Carrollton has attempted to reconcile the alleged contradictions raised by the Johnsons' testimony, Cohen's deposition, and the several affidavits Faulkner submits, but it has not adequately rebutted petitioner's serious allegations concerning the existence of a signed partnership agreement. Although Faulkner has failed to produce a copy of the partnership agreement between Cohen and the Johnsons, the Board is confronted with conflicting affidavits and testimony in this regard. In our view, the serious questions raised are best resolved on the basis of an evidentiary inquiry. See *Folkways Broadcasting Co., Inc.*, 27 FCC

2d 619, 21 RR 2d 163 (1971).[6] An appropriate issue will therefore be specified.

6. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed June 27, 1973, by Faulkner Radio, Inc. (WLBB) IS GRANTED; and

7. IT IS FURTHER ORDERED, That the issues in this proceeding are enlarged to include the following:

To determine whether Al Cohen has and/or had a one-third ownership interest in Radio Carrollton, and whether William P. Johnson and Hollis B. Johnson, d/b as Radio Carrollton, have been lacking in candor with the Commission concerning this interest, and, if so, to determine the effect thereof upon the applicant's qualifications to be a Commission licensee.

8. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue added SHALL BE on Faulkner Radio, Inc. (WLBB), and the burden of proof under this issue SHALL BE on Radio Carrollton.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[6] Compare *Martin Lake Broadcasting Co.*, 28 FCC 2d 457, 21 RR 2d 631 (1971), where a petition was not supported by affidavits of persons with personal knowledge, and possible minor inconsistencies in a deposition and affidavits did not raise a substantial question as to the existence of a concealed ownership agreement.

APPENDIX K

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WILLIAM P. JOHNSON AND HOLLIS B. JOHNSON, DOING BUSINESS AS RADIO CARROLLTON, CARROLLTON, GA. Requests: 1330 kHz, 500 W, Day For Construction Permit	Docket No. 19636 File No. BP-17970
FAULKNER RADIO, INC. (WLBB), CARROLLTON, GA. Has: 1100 kHz, 1 kW, Day For Renewal of License	Docket No. 19637 File No. BR-1431

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration (i) the application of Radio Carrollton for a construction permit; (ii) the application of Faulkner Radio, Inc. for renewal of license; (iii) a petition to deny the application of Radio Carrollton filed by Faulkner Radio, Inc.; and (iv) pleadings in opposition, reply, and supplement thereto.

2. This case arose as a result of a petition to deny the application of Radio Carrollton filed on June 18, 1968, by Faulkner Radio, Inc., licensee of station WLBB, Carrollton, Georgia, requesting that the application be denied or alternatively designated for hearing on the issues requested. Faulkner questioned the character and financial qualifications, and the community survey submitted by the applicant. Radio Carrollton answered with its explanation of the character allegations, as well as additional financial data and community survey information. It also submitted an affidavit of Hollis B. Johnson, a partner of Radio Carrollton, which averred that Robert M. Thornburn, Vice President of Faulkner Radio, Inc., admitted to him in a telephone conversation that Faulkner filed the petition only to delay the grant of the construction permit. Mr. Thornburn deposed in his response that the statements attributed to him were untrue which indicated that Faulkner's petition was interposed for the purpose of delay. Subsequently, numerous supplemental petitions, answers, and replies were filed raising additional questions as to the applicant's character qualifications. The petitioner also questioned the applicant's compliance with 1.65 of the Commission's rules [1] and site availability.[2]

[1] Section 1.65 requires an applicant to provide complete and accurate information for all the matters disclosed in a pending application, and it further requires the applicant to inform the Commission within 30 days whenever there has been a substantial change as to any other matter which may be of decisional significance.

[2] Faulkner has also raised numerous other questions during the pendency of the application; however, they will not be discussed below since they are inconsequential and lacking in merit.

3. The factual disputes mentioned above inextricably connect the applications of Radio Carrollton for a construction permit and Faulkner Radio, Inc., for a license renewal. The Commission will, therefore, consolidate these two applications for hearing, pursuant to section 1.227(a)(1) of the Commission's rules, to permit an orderly resolution of the questions presented. There is no engineering conflict between the two applications.

Character Qualification and Rule 1.65

4. The initial petition to deny filed by Faulkner on June 18, 1968, requested an evidentiary hearing inquiring into the character qualifications of Hollis B. Johnson, a partner in Radio Carrollton and the law firm of Johnson & Johnson. Faulkner based its request upon an affidavit sworn to by Lord Madden alleging that Johnson fraudulently acquired a parcel of the applicant's property in the course of their attorney-client relationship. Near the end of this relationship, Madden swears, Johnson coerced him into signing a bank deed [3] with no one else present. Subsequently, the deed was completed, witnessed by William Johnson and Linda Jeters, and recorded. Several months after the alleged transaction, Madden filed a petition in bankruptcy. The trustee in bankruptcy instituted a suit against Hollis B. Johnson to recover the property for the benefit of creditors. The case resulted in a court settlement which gave Hollis B. Johnson $800 in exchange for the deed.

5. Radio Carrollton responded to this charge with an affidavit of Hollis B. Johnson and William P. Johnson. The Johnsons deposed that they represented Madden for several years, but never demanded payment for the fees because of Madden's weak financial status. After a falling out with Madden, however, they decided to collect the fees due and owing. To this end, they contend, the deed was accepted as security. The applicant also controverted Madden's claim he was coerced into signing the deed out of a fear that the Johnsons would employ some less desirable method for collection. Madden claimed the Johnsons had previously frozen his accounts in order to collect their fees. An affidavit of E. H. Hearn, President of the West Georgia National Bank, recites that the Johnsons had never frozen Madden's account for a personal indebtedness due Johnson & Johnson law firm. Finally, the applicant submitted numerous affidavits of Carrollton citizens attesting to the high public character of Hollis B. Johnson.

6. Faulkner's response affirmed its original charge and challenged several statements made in the applicant's reply. This challenge, briefly stated, claims that the final billing by the Johnsons showed Madden received $924.40 worth of services, paid $100 on the account, and carried a balance of $824.40. The deeded property, however, was sold for $2,648. In light of these facts, Faulkner asks, how could the

[3] Madden referred to the deed as a "security deed." Likewise, the applicants stated generally that the property was deeded to them as security for the fees due and owing, and, in the event Madden could not pay, the land would be payment. Under Georgia law, a "security deed" is an absolute deed *intended as security*. In such a conveyance, legal title passes to the vendee until the debt secured by the conveyance is fully paid. At the same time, the vendor retains an equitable estate in the premises conveyed. *Merchants' and Mechanics' Bank* v. *Board*, 134 S.E. 187 (Ga., 1926).

applicant's opposition to the petition to deny claim the property was "only partial recompense," and the firm never received any fees from Madden? Those contradictions, concludes the petitioner, cast doubt upon the Johnsons' credibility.

7. A Supplement to the Petition to Deny filed on January 3, 1969, informed the Commission that, among other things, Madden had filed a complaint with the Grievance Committee of the Carroll County, Georgia, Bar Association based on the allegations made above. We subsequently were informed that the Committee investigated the allegations made, and concluded that no disciplinary action was warranted.[4]

8. Upon consideration of all the facts before us, we are not persuaded that additional Commission inquiry into this matter is necessary. Faulkner has attempted to show that the applicant, and specifically Hollis B. Johnson, violated Georgia State law and the Code of Ethics of the Georgia Bar. It has traditionally been our policy to decline to interfere in matters of alleged violation of such laws and ethics where local tribunals have apparently deemed the allegations nonmeritorious. Cf. *Home Service Broadcasting Corporation*, 23 FCC 2d 914, 19 RR 2d 315 (1970); *Home Service Broadcasting Corporation*, 21 FCC 2d 168, 18 RR 2d 63 (1970); *North American Broadcasting Co., Inc.*, 15 FCC 2d 979, 15 RR 2d 311 (1969). The actions raised by Faulkner were alleged in the complaint filed by the trustee in bankruptcy for Loyd Madden in the U.S. District Court for the Northern District of Georgia, and in the complaint presented to the Grievance Committee of the Carroll County, Georgia Bar Association. Neither tribunal made a finding that Hollis B. Johnson nor William P. Johnson acted illegally or with any impropriety. Accordingly, we decline further inquiry into the matter.

Misrepresentation; 1.65

9. In the course of the pleadings, Faulkner raised several questions as to Radio Carrollton's lack of candor and misrepresentation, and failure to comply with rule 1.65. It avers there are several specific instances in the pleading where the affidavits filed by the applicant conflict with theirs in material respects. These recurring inconsistencies, claim Faulkner, create a pattern that shows the applicant has not been truthful with the Commission. The alleged points of conflict are as follows:

(a) During the controversy involving the alleged improper activities of the applicant partners in the course of their law practice described above in paragraphs 3 through 8, Loyd Madden filed a complaint with the Grievance Committee of the Carroll County Bar Association concerning the alleged misconduct. After waiting 30 days, the elapsed time wherein it assumed Radio Carrollton must inform the Commission of this filing, Faulkner informed the Commission that the complaint had been filed, claimed the applicant knew of the complaint, and requested the Commission include a 1.65 issue

[4] Letter from William J. Wiggins, Chairman of Grievance Committee, received August 9, 1972.

against the applicant. It supported its allegations with affidavits sworn to by William J. Wiggins, Chairman of the Grievance Committee, and Dewey Smith, a newly appointed member of the committee, stating that the Johnsons knew of the complaint's pendency for more than 30 days. In response, Hollis B. Johnson swore he could not recall when the committee informed him that a grievance had been filed against him. Subsequently, Faulkner argued that this evasiveness is but a single example of the overall pattern of the applicant's untruthfulness.

(b) Faulkner filed an affidavit of O. S. Whitman, owner of property proposed for the transmitter site, which disclosed for the first time that the option had expired, that he had no present intention of selling the land to the applicant, and that he had communicated this to the applicant. More than 30 days had elapsed from the time Whitman swore he told the Johnsons of the filing of this affidavit. The partners individually replied they were never definitely told the land was no longer available. Although Radio Carrollton subsequently amended its application to specify a new site, the petitioner argues that this does not obviate the 1.65 issue, or the misrepresentation issue since the direct conflict between the affidavits persists.

(c) Finally, Faulkner claims that the applicant has attempted to mislead the Commission as to the facts surrounding the second antenna site. It argues that the site was unavailable because a proposed highway's right-of-way passed over part of the site, and Georgia law prohibits a public official (William J. Johnson was counsel for Carroll County) from contracting with the state for less than adequate consideration. As a result, they argue the lease for the site was invalid *ab initio*. These allegations were supported by an affidavit of the Secretary of the State Highway System Committee, House of Representatives, State of Georgia, and an opinion of Georgia counsel. In response, the applicant moved the site to avoid the proposed right-of-way, and informed the Commission that a grand jury had investigated the lease and found no impropriety. Ultimately, however, the applicant specified an entirely new site. Again, Faulkner complained that the representations made by Radio Carrollton as to the lease are another example of the applicant's misrepresentations and asks that this matter also be placed in issue.

10. All told, Faulkner argues a question as to Radio Carrollton's fitness to be a Commission licensee must be placed in issue as a result of the several enumerated instances of alleged misrepresentations and lack of candor. A misrepresentation issue is not mooted merely because an intervening event, namely the finding by the Grievance Committee that no action is warranted against the Johnsons or the specifying of a new antenna site, removes the substantive issue from Commission consideration. There remains the question whether the applicant misrepresented itself to the Commission. Cf. *Midwestern Broadcasting Co., Inc.*, 19 FCC 2d 691, 17 RR 2d 342 (1969). *FCC v. WOWO, Inc.*, 329 U.S. 223, 67 S. Ct. 213 (1946). Accordingly, we will consider the petitioner's allegations of misrepresentation to determine whether the appropriate issues should be included.

11. The petitioner avers the applicant's failure to inform the Commission that a complaint had been filed with the County Bar Grievance Committee raises a 1.65 issue; and the applicant's subsequent evasive response to its pleading informing the Commission that a complaint had been filed requires the inclusion of a misrepresentation issue. It reasons that the applicant was obligated to inform the Commission of this filing because Radio Carrollton had included in its pleading a statement by William J. Wiggins that there had never been any grievances filed against the partners of the application, and because the outcome could be of decisional significance. We do not agree. An applicant is required, as a general matter, to keep the Commission informed of changes in the information requested in the application. This requirement has been modified to the extent that the filing of any lawsuit alleging misconduct must be considered a substantial and significant matter, and must be reported.[5] The filing of a complaint with a grievance committee is not sufficiently analogous, however, to require the reporting of the event. A bar grievance proceeding is, by its very nature, quasi-judicial and normally conducted in a confidential manner.[6] Accordingly, we are not convinced that Radio Carrollton was obligated to report the grievance complaint filed against the Johnsons within 30 days after the filing. If, on the other hand, a grievance committee were to find the applicant violated the Canons of Professional Responsibility, then it should be obvious that the information would be "any other matter which may be of decisional significance" within the purview of rule 1.65. Moreover, we do not regard the alleged discrepancy between the affidavits submitted by the parties of such a nature as to raise a misrepresentation issue.

12. We are not, furthermore, convinced that a misrepresentation issue is warranted based on alleged misleading statements given by Radio Carrollton concerning the second antenna site. The applicant's representations concerning the site location and lease validity have been satisfactorily explained. By Faulkner's own admission, the state did not firmly establish the proposed highway's right-of-way until after the applicant specified a new site.[7] We also note that during the intervening period, the applicant amended the site location to avoid interference with the then referenced right-of-way. Moreover, Radio Carrollton reports in its "Opposition to Further Supplement to Petition to Deny" filed December 13, 1971, the Grand Jury of Carroll County investigated the lease and found no impropriety. The enforceability of this lease is a question of local law. Accordingly, we will not inquire further into the representations made as to the lease since a local grand jury apparently deemed the allegations nonmeritorious. *Home Service Broadcasting Corporation, supra.*

13. Finally, Faulkner alleges that Radio Carrollton's first proposed transmitter site, by virtue of an affidavit of the landowner, was not

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[5] *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 16 RR 2d 946 (1969).

[6] In his sworn statement sent to the Commission to confirm the filing of a grievance complaint against the Johnsons, William J. Wiggins also stated that the statements transmitted "are confidential and shall not be published."

[7] In its "Further Supplement to Petition to Deny" filed November 19, 1971, Faulkner included an article from the *Carroll County Georgian* of November 11, 1971, announcing that the bids for the proposed by-pass will be let in 30 days. Radio Carrollton specified a new site in its amendment filed October 13, 1971.

available, and that the applicant knew this for more than 30 days without notifying the Commission, thus raising a 1.65 issue. It also requests a misrepresentation issue because it avers the affidavits relied upon by the applicant and petitioner conflict in material respects. The applicant denied knowing the site was no longer available and apparently infers, therefore, it could not be expected to report this substantial change. Based on the pleadings, we cannot make a final determination. Accordingly, issues will be included to determine the facts and circumstances concerning the availability of O. S. Whitman's site, to determine whether Radio Carrollton failed to keep its application current and correct, to determine whether the applicant represented itself with candor to the Commission, and to determine, in the event the issues are resolved against the applicant, the effect upon Radio Carrollton's basic qualifications to receive a grant of their proposal.

Abuse of Commission Processes

14. In its opposition to Faulkner's petition to deny, filed July 25, 1968, Hollis B. Johnson deposed that Robert M. Thornburn, Vice President of Faulkner Radio, Inc., contacted him by telephone and discussed the Radio Carrollton application. He swears Thornburn told him that he "[found] it necessary to object to the application" for purposes of delaying the grant of the construction permit because they were experiencing "money problems." The character issue was made only because he (Thornburn) was "grasping at straws." In light of the conversation, concludes Radio Carrollton, this matter should be considered at the time of Faulkner's renewal, and in evaluating the petition to deny. Thornburn deposed in rebuttal that a conversation did take place in the manner and at the time claimed by the applicant. He swears, however, that Johnson misrepresents the substance of the conversation. "Mr. Johnson's affidavit attributes statements to me which I did not make and misconstrues those statements which I did make to him." Since the sworn statements are clearly in conflict and no other information is available, a substantial question of fact exists which must be explored in hearing. Therefore, we will include appropriate issues as to the applicants.

Suburban and Financial Issues

15. Throughout the pendency of the Radio Carrollton application, the petitioner has raised numerous questions concerning the applicant's community survey. Radio Carrollton each time has amended its survey in response to these questions. Therefore, it would be fruitless for the Commission to examine all the specific questions raised. Moreover, the specific Commission requirements have been modified over the past five years. Our examination of the applicant's community survey, when measured against the *Primer*[8] reveals that several deficiencies persist, and we will include a Suburban[9] issue. Specifically, we note that the

[8] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 36 FR 4092, 27 FCC 2d 650 (1970).
[9] *Suburban Broadcasters*, 20 RR 951 (1961).

demographic data does not sufficiently detail the economic, educational, and governmental activities, and any other factors which tend to make Carrollton distinctive. Without this information, we cannot make a determination that the applicant has consulted with leaders from all segments and factions of the community. Finally, the applicant has not indicated the anticipated time segments for the proposed programs.

16. We have also found several deficiencies in Radio Carrollton's financial proposal. The applicant estimates its first-year construction and operating expenses to be $76,519, as follows: down payment and first two (2) months' payments on the equipment lease, $5,009; principal and interest payments on loans, $21,750; land, $9,000; miscellaneous expenses and equipment not covered by lease, $4,722; and working capital, $36,038. To meet these expenses, the applicant relies upon three (3) bank letters for a total of $75,000, and any additional cash which may be needed.[10] The bank letters are now more than a year old, however, and hence unacceptable. The balance sheets for the partners are also more than a year old, and must be updated. Accordingly, we will specify a financial issue in order to examine this further in hearing.

17. Except as indicated by the issues specified below, the construction permit applicant is qualified to construct and operate as proposed, and the renewal applicant is qualified to continue operation. In view of the foregoing, however, the Commission is unable to make the statutory finding that a grant of the subject applications would serve the public interest, convenience and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to section 309 (e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine the efforts made by Radio Carrollton to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

2. To determine with respect to the application of Radio Carrollton:

(a) Whether the commitments by the Commercial Bank, West Georgia National Bank, and Peoples Bank are still available to the applicant:

(b) Whether the partners possess adequate current assets to finance the proposed station: and

(c) Whether, in light of the evidence adduced pursuant to (a) and (b), above, the applicant is financially qualified.

3. To determine whether Radio Carrollton has complied with the provisions of section 1.65 of the Commission's rules by keeping the Commission advised of substantial and significant changes as required

[10] The partnership agreement, in article 10, provides that in the event additional capital is needed the partners will contribute equally.

by section 1.65, and, if not, the effect of such non-compliance on its basic qualifications to be a Commission licensee.

4. To determine whether Radio Carrollton misrepresented itself to the Commission pertaining to the availability of the land owned by O. S. Whitman as an antenna site, and, if so, what effect such conduct has on the basic qualifications of Radio Carrollton to be a Commission licensee.

5. To determine whether Faulkner Radio, Inc., filed its petition to deny for the purpose of delaying the processing of Radio Carrollton's application, and, if so, what effect such conduct has on the basic qualifications of Faulkner Radio, Inc., to be a Commission licensee.

6. To determine whether Faulkner Radio, Inc., or Radio Carrollton misrepresented itself to the Commission in its affidavit submitted concerning the conversation between Robert M. Thornburn and Hollis B. Johnson, and, if so, what effect such conduct has on the basic qualifications of either applicant to be a Commission licensee.

7. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the Radio Carrollton application and/or renewal of the Faulkner license would serve the public interest, convenience, and necessity.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein, pursuant to section 1.221(c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this Order file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended and section 1.594 of the Commission rules give notice of the hearing, either individually or, if feasible and consistent with the rules, jointly, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX L

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

COMMUNICATIONS ACT OF 1934, AS AMENDED

Title 47 U.S.C.

TITLE III—PROVISIONS RELATING TO RADIO

ACTION UPON APPLICATIONS; FORM OF AND CONDITIONS ATTACHED TO LICENSES

SEC. 309.

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to

file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.[74]

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[74]The second sentence of section 309(e) was amended by Public Law 88-306, approved May 14, 1964, 78 Stat. 193, to require a party in interest who wishes to intervene in a hearing to signify his intention to do so not more than thirty days after publication of the hearing issues, or any substantial amendment thereto, in the Federal Register. This sentence formerly read as follows:

[footnote continued]

Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405.

(g) The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this section.

(h) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such

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When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing.

license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act; (3) every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 of this Act.[75]

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION, 47 C.F.R.

Title 47—Telecommunication

Chapter I—Federal Communications Commission

§ 73.3539 Application for renewal of license.

(a) Unless otherwise directed by the FCC, an application for renewal of license shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed, except that applications for renewal of license of an experimental or developmental broadcast station shall be filed not later than the first day of the second full calendar month prior to the expiration date of the license sought to be renewed. If any deadline prescribed in this paragraph falls on a nonbusiness day, the cutoff shall be the close of business of the first full business day thereafter.

(b) No application for renewal of license of any broadcast station will be considered unless there is on file with the FCC the information, if any, currently required by §§ 73.3611-73.3615, inclusive, for the particular class of station. The renewal application shall include a reference by date and file number of such information on file.

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[75]Section 309 was amended to read as above by Public Law 86-752, approved September 13, 1960, 74 Stat. 889. It formerly read as follows:

(c) Whenever the FCC regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified. If the licensee fails to file such application within the prescribed time, the hearing or investigation shall proceed as if such renewal application had been received.

(d) The following application forms shall be used:

(1) FCC Form 303, "Application for Renewal of License for Commercial TV Broadcast Station."

(2) FCC Form 303-R, "Application for Renewal of License for Commercial AM or FM Radio Broadcast Station."

(3) FCC Form 311, "Application for Renewal of an International, Experimental Television, Experimental Facsimile, or a Developmental Broadcast Station License."

(4) FCC Form 313, "Application for Authorization in the Auxiliary Broadcast Services." To be used for applications for renewal of licenses of auxiliary broadcast stations only when there has been a change in the information contained in the initial application for license.

(5) FCC Form 313-R, "Application for Renewal of Auxiliary Broadcast License (Short Form)." To be used for applications for renewal of license of auxiliary broadcast stations where there has been no change in the information contained in the initial application for license.

(6) FCC Form 330-R, "Application for Renewal of Instructional TV Fixed Station and/or Response Station and Low Power Relay Station(s) License."

(7) FCC Form 342, "Application for Renewal of a Noncommercial Educational Broadcast Station License."

(8) FCC Form 348, "Application for Renewal of TV or FM Broadcast Translator Station License."

(9) FCC Form 349-R, "Application for Renewal of FM Broadcast Booster Station License."

[44 FR 38495, July 2, 1979]

§ 73.3584 Petitions to deny.

(a) Any party in interest may file with the FCC a petition to deny any application (whether as orginially filed or if amended so as to require a new file number pursuant to §§ 73.3571(j), 73.3572(b), 73.3573(b) or 74.3574(b)) for which local notice pursuant to § 73.3580 is required, provided such petitions are filed prior to the day such applications are granted or designated for hearing; but where the FCC issues a public notice pursuant to the provisions of §§ 73.3571(c), 73.3572(c) or 73.3573(d), establishing a "cut-off" date, such petitions must be filed by the date specified. In the case of applications for renewal of license, petitions to deny may be filed at any time up to the last day for filing mutually exclusive applications under § 73.3516(e). Petitions to deny shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. Such allegations of fact shall, except for those for which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. Requests for extension of time to file petitions to deny applications for new broadcast stations or major changes in the facilities of existing stations or applications for renewal of license will not be granted unless all parties concerned, including the applicant, consent to such requests, or unless a compelling showing can be made that unusual circumstances make the filing of a timely petition impossible and the granting of an extension warranted.

(b) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons

with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in § 1.45 except that as to a petition to deny an application for renewal of license, an opposition thereto may be filed within 30 days after the petition to deny is filed, and the party that filed the petition to deny may reply to the opposition within 20 days after the opposition is due or within 20 days after the opposition is filed, whichever is longer. The failure to file an opposition or a reply will not necessarily be construed as an admission of any fact or argument contained in a pleading.

(c) Untimely petitions to deny, as well as other pleadings in the nature of a petition to deny, and any other pleadings or supplements which do not lie as a matter of law or are otherwise procedurally defective, are subject to return by the FCC's staff without consideration.

[44 FR 38506, July 2, 1979; 44 FR 40890, July 13, 1979]

No. 80-1169

MAR 18 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

FAULKNER RADIO, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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QUESTION PRESENTED

Whether the Federal Communications Commission properly employed the "preponderance of evidence" test in denying petitioner's application for a broadcast license renewal on the grounds of misrepresentation and abuse of process.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1169

FAULKNER RADIO, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is unpublished. The initial opinion of the court of appeals remanding the case to the Commission (Pet. App. 36a-54a) is reported at 557 F. 2d 866. The opinions of the Federal Communications Commission (Pet. App. 3a-11a, 15a-16a, 17a-35a) are reported at 72 F.C.C. 2d 264, 69 F.C.C. 2d 424, and 69 F.C.C. 2d 1139.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1980. The petition for a writ of certiorari was filed on January 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1967, William P. Johnson and Hollis B. Johnson (no relation), doing business as Radio Carrollton,

filed an application with the Federal Communications Commission for a permit to construct and operate a new radio station in Carrollton, Georgia. Faulkner Radio, the licensee of the only existing radio station in Carrollton, petitioned the Commission to deny Radio Carrollton's application on the grounds of alleged character and financial deficiencies and an alleged failure to ascertain properly the needs and interests of the community. Radio Carrollton's opposition to that petition charged Faulkner with material misrepresentations and abuse of process. Because both parties had made serious charges against the other that reflected on their qualifications to be Commission licensees, Radio Carrollton's broadcast application and Faulkner's application to renew its own broadcast license were designated for a consolidated hearing (Pet. App. 119a-126a).

At the conclusion of the hearing, the Administrative Law Judge ("ALJ") found that Faulkner Radio had "embarked on an apparently calculated campaign to mislead and deceive this Commission * * * for the purpose of thwarting or delaying the initiation of a competing broadcast service in Carrollton, Georgia" (Pet. App. 107a). Evidence pertaining to three incidents supported that conclusion. First, contrary to statements submitted on behalf of Faulkner Radio, the evidence showed that Robert Thorburn, Faulkner's vice president and general manager, admitted in a telephone conversation with Hollis Johnson that because of financial difficulties experienced by Faulkner, he filed the petition to deny against Radio Carrollton in order to delay the advent of competition for a few months until Faulkner could acquire sufficient funds to meet certain corporate obligations (*id.* at 78a-82a). Second, the evidence showed that Thorburn submitted to the Commission a fraudulently induced, inaccurate, and improperly executed affidavit by the owner of the land specified by Radio Carrollton as the

site for its antenna tower (Pet. App. 92a-97a).[1] Finally, the evidence indicated that Thorburn had contacted a radio engineer to explore the possibility of filing an application mutually exclusive with that of Radio Carrollton in order thus to ensure that the Radio Carrollton application could not be granted without a lengthy and costly hearing. The ALJ was openly skeptical about the veracity of Thorburn's testimony about his dealings with the engineer (*id.* at 82a-84a).

At the conclusion of the hearing, the ALJ found Thorburn's testimony concerning these and other incidents to be evasive, misleading, and contradictory, and, accordingly, he denied Faulkner's license renewal on the grounds of willful and intentional misrepresentation (Pet. App. 113a). As an alternative and independent ground, the ALJ also denied the license renewal because Faulkner's petition to deny the Radio Carrollton application was a "strike petition," *i.e.*, it was "undoubtedly filed with this Commission primarily for the purpose of causing delays in the processing of Radio Carrollton's application and thereby postponing the day when it might have to be confronted with competition in Carrollton, Georgia" (*id.* at 113a). The Commission affirmed the ALJ's decision (Pet. App. 59a-72a).

2. The court of appeals remanded the case to the Commission for further proceedings (Pet. App. 36a-54a). The court noted (*id.* at 41a-42a) that the ALJ had afforded a

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[1]The owner, O.S. Whitman, stated in his affidavit that the land was no longer available, thus making it appear that Radio Carrollton had failed to keep the Commission informed of major changes in the status of its application as required by Commission rules. Whitman, however, had never told the Johnsons that the antenna site was no longer available and Thorburn had obtained the affidavit by falsely telling Whitman that the Johnsons planned to sue Whitman to enforce an option on the land. Moreover, the affidavit had not been executed with any of the requisite formalities (Pet. App. 92a-97a).

presumption of veracity to the testimony of the Johnsons because they were lawyers, and that, in affirming the conclusion of the ALJ, the Commission had evidently concurred. The court concluded that the presumption was not justified, and directed the Commission to reconsider the case without applying the erroneous presumption (Pet. App. at 36a, 48a). The court also expressed concern that the Commission's "strike" policy could penalize broadcasters who file petitions to deny with even a minor, incidental motive to delay action on the potential competitor's application. Because, in the court's view, such a broad prohibition might have an undue chilling effect, it instructed the Commission to refine its policy so as to remove the potential chill (*id.* at 52a-54a).

3. On remand, the Commission performed a de novo review of the testimony and documentary evidence and, mindful of the court of appeals' holding against affording any presumption of lawyer veracity, reaffirmed its earlier findings that Thorburn's testimony was so riddled with contradictions, equivocations, and inconsistencies that lack of candor and misrepresentation were evident. Accordingly, the Commission held that on this ground alone Faulkner's license renewal should be denied (Pet. App. 19a-26a).[2] Subsequently, to avoid any misunderstanding of its opinion, the Commission declared that it had employed the customary "preponderance of the evidence" test in its

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[2]The Commission also clarified its "strike" policy, declaring that it would penalize only those licensees who file petitions against potential competitors when the *primary* purpose of the petition is to delay the administrative proceedings. It established evidentiary criteria that would assist it in discerning whether there was such a primary purpose and, employing those criteria, it found that Faulkner had engaged in improper conduct in filing its application to deny Radio Carrollton's application. On that additional ground, the Commission again declared Faulkner to be unqualified to remain a Commission licensee (Pet. App. 26a-33a).

review of the evidence in this case (Pet. App. 15a-16a). The court of appeals summarily affirmed the Commission's decision (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. There is no need for the Court to reach petitioner's challenge to the Commission's "strike petition" policy in the context of a petition to deny, since the Commission concluded, and the court of appeals agreed, that Faulkner's misrepresentations and lack of candor constituted sufficient and independent grounds for denying Faulkner's renewal application (Pet. App. 2a, 19a, 26a).[3] See *Barr* v. *Matteo*, 355 U.S. 171, 172 (1957).[4]

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[3]Indeed, the Commission viewed the misrepresentations and lack of candor as the more dispositive ground for denying renewal (Pet. App. 19a). It proceeded to clarify its strike policy because the court of appeals had directed it to do so on remand (*id.* at 26a).

[4]In any event, the argument does not warrant this Court's review. This Court's decisions in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), relied upon by petitioner (Pet. 10-11), do not support petitioner's alleged right to file with impunity a petition to deny where the primary purpose of the petition is to obstruct the Commission's action on applications of potential competitors. On the contrary, this Court has specifically recognized that "unethical conduct in the setting of the adjudicatory process often results in sanctions." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972).

Nor, contrary to petitioner's suggestion (Pet. 13-15), does the Commission's strike policy contravene Section 309(d) of the Communications Act of 1934, 47 U.S.C. 309(d), which affords existing licensees the right to file petitions to deny competing broadcast license applications. As the Commission properly concluded, the right to administrative process for petition and redress does not incorporate the right to abuse that process with impunity (Pet. App. 28a).

2. The Commission has the power to deny a license renewal because of misrepresentations to the Commission. *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946). Faulkner argues (Pet. 15-22), however, that in view of the severity of the sanction levied in this case, the Commission should have employed a "clear and convincing test" in its weighing of the evidence, instead of the customary "preponderance" test.

This argument is foreclosed by this Court's recent decision in *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981). In *Steadman*, the Court held that under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), the Securities and Exchange Commission had properly applied a preponderance of the evidence standard of proof in a disciplinary proceeding brought to determine whether an investment adviser had violated the securities laws. After reviewing the language and legislative history of Section 7(c), the Court concluded that Congress had "expressed its intent that adjudicatory proceedings subject to the APA satisfy the statute where determinations are made according to the preponderance of the evidence." *Steadman* v. *SEC, supra*, slip op. 13. Under *Steadman*, therefore, the Commission properly relied upon Section 7(c) as authority for application of the preponderance standard (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1169

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v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
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REPLY TO "BRIEF FOR THE RESPONDENT IN OPPOSITION"

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REPLY

THE COURT SHOULD AND MUST CONSIDER THE CONSTITUTIONALITY OF THE COMMISSION'S STRIKE PETITION POLICY AT THIS TIME

In its "Brief for the Respondent in Opposition" the Government argues that there is no need for the Court to

reach petitioner's challenge to the Federal Communications Commission's "strike petition" policy, since the Commission concluded (and the Court of Appeals affirmed the Commission's decisions) that the misrepresentations and lack of candor of Faulkner Radio, Inc.'s (Faulkner) former vice president and minority stockholder constituted sufficient and independent grounds for denying Faulkner's renewal application, citing *Barr v. Matteo*, 355 U.S. 171, 172 (1954). In *Barr*, this Court vacated and remanded a decision of the U.S. Court of Appeals for the District of Columbia Circuit with directions to the court to pass on a narrower question which would have been dispositive of the case. The Court noted that it could not issue advisory opinions and could not settle an important issue of constitutional law "unless actually compelled by the litigation before it." 355 U.S. at 172. As set forth below, the effect of the Commission's holding with regard to the strike petition issue compels this Court's consideration of the constitutional issue raised.

Moreover, since and despite its holding in *Barr*, this Court has on occasion addressed broad legal and constitutional issues, not compelled by the cases before it. *See, e.g., Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974) (in which the Court addressed the broader question of the constitutionality of an Indiana loyalty oath statute despite the fact that the case could have been decided on a narrower issue); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (in which the Court held that a complaint failed to satisfy the threshold case or controversy requirement and then proceeded to discuss whether, even assuming the complaint had presented a case or controversy, the complaint stated a sound basis for equitable relief). Thus, it is clear that *Barr* does not

preclude this Court from addressing the constitutional issue presented in Faulkner's case.

I.

IF THE COURT FAILS TO ADDRESS THE CONSTITUTIONALITY OF THE COMMISSION'S STRIKE PETITION POLICY, THE *FAULKNER-RADIO CARROLLTON* DECISIONS WILL REMAIN A WARNING TO ALL RADIO AND TELEVISION LICENSEES THAT THEY CANNOT FILE PETITIONS TO DENY APPLICATIONS OF POTENTIAL COMPETITORS WITHOUT RISKING FORFEITURE OF LICENSE.

The *Faulkner-Radio Carrollton* decisions, if allowed to stand, will have a chilling effect on the constitutional right of all licensees to file petitions to deny against competitors or potential competitors. The FCC decisions clearly stand for the principle that the filing of a petition to deny for the primary purpose of delay is ground for the denial of a petitioner's renewal application. The adverse impact on the public interest is as clear and immediate as if the strike petition finding were the sole ground for denial of Faulkner's renewal application.[1]

The Court of Appeals shared Faulkner's concern for the chilling effect the FCC's strike policy would have on the First Amendment rights of broadcast licensees, and, in remanding this case to the Commission in 1977, the

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[1] This Court has recognized in cases involving communications and antitrust that it is the one who is likely to be economically injured by competition who will be motivated to provide information to the government. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The FCC's strike petition policy is only applicable to licensees who file petitions against competitors or potential competitors.

Court stated that the Commission would be "well advised" to clarify its policy on strike petitions. App. 54a. The Commission originally defined a strike petition as one filed where *one of* the purposes in filing was "to obstruct, impede and delay the grant" of an application. App. 66a. On remand, the Commission "clarified" this definition to encompass only those petitions filed with the "primary" purpose to delay. App. 10a. It is submitted that this clarification does not remove the chilling effect upon a licensee's constitutional right to petition its government. If the "clarified" policy is allowed to stand, a licensee will know that there will be a weighing or measuring of its motives in filing a petition[2] and that, if the FCC determines that its primary purpose was delay, it will be found unqualified to be a Commission licensee. The factors upon which the Commission will base its determination of whether a licensee's primary purpose was to delay include the licensee's economic motivation. App. 29a. Moreover, the fact that the petition raises serious, bona fide issues against an applicant will not preclude the Commission from finding that the petitioner's delaying purpose was primary. The Commission found that two of the three issues raised by Faulkner Radio, Inc. (Faulkner) in its original petition to deny and seven of its eight supplements thereto were bona fide. App. 33a and n. 30, App. 65a and n. 14. Yet the Commission concluded that Faulkner's primary purpose in raising bona fide issues against its potential competitor was to delay grant of its competitor's application.

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[2] It is reasonable to anticipate that any applicant against which a petition to deny is filed by a competitor will as a tactical device charge that it is a strike petition in order to shift the attack to the petitioner and away from itself. The requirement to respond to a charge of improper motive alone is chilling.

It is submitted that the Government's argument that *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), do not support Faulkner's right to file a petition to deny is simply wrong. Those cases held that the right to petition the government included the right to petition for action even though the sole purpose in petitioning was to destroy competitors. The rationale of those cases is fully applicable to the instant case, since the purpose of the petitioners in those cases and in *Faulkner* is the same.

II.

THE FCC'S FINDING THAT FAULKNER RADIO, INC. FILED A STRIKE PETITION MAY WELL BE THE DECISIVE FACTOR IN THE FCC'S DETERMINATION ON THE FATE OF FAULKNER'S OTHER SIX BROADCAST LICENSES.

In the *Radio Carrollton* decisions the Commission made two separate findings relating to Faulkner's character qualifications and held that each was an independent reason for denying Faulkner's application for renewal of the license of WLBB. In *Faulkner Radio, Inc.*, 61 F.C.C.2d 23 (1976), App. 55a, the FCC, in an unprecedented action, decided that, in lieu of the normal evidentiary hearing, it would order an oral argument on Faulkner's other six radio licenses. The Commission stated that its findings in the *Radio Carrollton* decision (1975) would be "*res judicata*" as to all of Faulkner's other broadcast holdings. App. 57A. The only issues specified for oral argument were:

> "1. To determine, in light of the Commission's findings in the matter of *Radio Carrollton, et al.*, 52 FCC2d 1173 (1975), whether Faulkner Radio, Inc.

possesses the requisite qualifications to be a broadcast licensee of this Commission.

"2. To determine, in light of the arguments made with respect to the foregoing issue, whether a grant of the above-captioned applications for renewal of licenses would serve the public interest, convenience and necessity." App. 57a.

The above oral argument has been continued pending final resolution of the instant proceeding. When the proceeding on the six licenses resumes, the Commission will apply its findings on *both the strike petition and misrepresentation issues* against Faulkner. While these findings will not be "*res judicata*",[3] Faulkner will be collaterally estopped from rearguing the merits of the Commission's findings. This inquiry is sufficient to justify Supreme Court consideration of Faulkner's right to petition under the First Amendment.

The Commission's findings on misrepresentation were *all* based on the conduct of Robert M. Thorburn, who was formerly Faulkner's Vice President and 15 percent shareholder. The findings on misrepresentation and lack of candor all involved Thorburn's testimony in the hearing and " 'his seeking to deceive the Commission in the submission.' of some of his affidavits." App. 26a. These activities of Thorburn were beyond the control of Faulkner Radio, Inc. and its majority stockholder, James H. Faulkner, Sr., a factor which will be relevant in weighing the effect that the misrepresentation findings will have on Faulkner's other six broadcast licenses.

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[3] The Commission has inappropriately applied the doctrine of *res judicata* when the doctrine of collateral estoppel is applicable. *See, e.g., RKO General, Inc.*, 82 F.C.C.2d 291, 312-13 (1980).

However, Faulkner's filing of the petition to deny and the June 1970 supplement were corporate acts. They constitute the only "misconduct" which can be attributed directly to Faulkner Radio, Inc. and indirectly to James H. Faulkner, Sr. Thus, the Commission's finding that Faulkner filed a strike petition to deny may well be the *decisive factor* in its future determination of whether Faulkner can continue as the licensee of its other six stations.

III.

THE COMMISSION'S FINDINGS AND CONCLUSIONS THAT FAULKNER FILED A STRIKE PETITION ARE SO INTERRELATED WITH ITS FINDINGS AND CONCLUSIONS ON MISREPRESENTATION THAT THEY CANNOT BE SEPARATED.

The Commission stated that Faulkner's original petition to deny and June 1970 supplement were strike petitions and held this constituted a separate and distinct ground for denying Faulkner's renewal application. *See* App. 33a. The other reason for denial was that the Commission found "substantial evidence in the record" to support the conclusion that Faulkner's Vice President and minority stockholder "also displayed lack of candor and committed knowing and willful misrepresentations." *See* App. 26a. Even a cursory reading of the decisions demonstrates that these two issues were so intertwined that it is impossible to consider one ground without the other.

It was Faulkner's filing of the petition to deny in 1968 that led to the designation for hearing of its application for renewal of the license for WLBB in 1972. The factual circumstances cited by the Commission to find that the petition to deny was filed for delay were also cited by it

to find misrepresentation.[4] Moreover, these findings were interdependent.[5] The Commission found that the mis-

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[4] For example, the Commission found that Thorburn had misrepresented facts in his account of the *June 20, 1968 telephone conversation.* App. 20a-21a. Only Thorburn and Hollis Johnson, the RC attorney to whom the ALJ and the Commission accorded a presumption of veracity because he was a lawyer, know what was said in that conversation. The Commission chose to believe Johnson, who claimed that Thorburn admitted filing the petition to deny for delay (App. 32a). Similarly, the Commission found that Thorburn's testimony concerning the *Thorburn-Holey correspondence* was both evidence of Thorburn's lack of candor (App. 25a) and evidence of conduct indicating that Thorburn was trying to find ways of delaying the RC application (App. 32a). No testimony or evidence was presented or offered to rebut the testimony of Thorburn and Holey, an engineer, as to the nature and meaning of their correspondence. Yet, the Commission chose to disbelieve both. The Commission also concluded that Thorburn had submitted an improperly executed *affidavit of O.S. Whitman* that withheld information necessary to the Commission's deliberations to support Faulkner's June 1970 supplement to Petition to Deny (App. 23a) and found that the June 1970 supplement was therefore a strike pleading (App. 32a). The affidavit was signed by O. S. Whitman, the owner of the land that the RC applicants proposed as a transmitter site. Whitman swore that the land was no longer available to the Johnsons and that he had told them so. The June 1970 supplement asked for an issue on the availability of the RC site. It was undisputed that, at the time the affidavit was signed, the option contract for its purchase had expired. The Commission concluded that Faulkner (Thorburn) had made misrepresentations by concealing "a crucial fact" in the affidavit that "at the time the 'affidavit' was drafted" the land was not unavailable to RC but was in a "check back" status. App. 32a. Whitman, the owner of the land, testified that he signed the affidavit and that the facts recited therein (that his land was no longer available to the Johnsons and that he had advised them of that fact) were true when he signed the affidavit. However, the Commission chose to believe the two lawyer principals of RC over Thorburn and Whitman and erroneously focused on the time at which the affidavit was *drafted* instead of when it was *signed.*

[5] That the delay and misrepresentation findings were interdependent is clearly seen in the Initial Decision of the ALJ. The delay

[footnote continued]

representations were illustrative of the motive or intent to file a strike petition. *See* App. 32a. It also found that the purpose of filing a strike petition provided the motive or intent to make misrepresentations. *See* App. 22a-32a, 107a-108a. The criteria the Commission established to determine whether a petition to deny was filed for delay were all developed from the testimony of Robert M. Thorburn. *See* App. 29a-33a, 64a-65a. The Commission's finding that Faulkner filed a strike petition was based on its characterization of Thorburn's testimony as evasive and contradictory, confusing and unpersuasive. *See* App. 31a-32a, 64a-67a.

It is clear the Commission's finding that Faulkner filed a strike petition was necessary to its findings on misrepresentation. If the Commission had not been so determined to make an example of a licensee for the filing of a "strike" petition, it would never have reached the question of whether Thorburn had misrepresented facts and displayed a lack of candor.

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or strike petition issues, issues 5 and 6 in the order designating the Faulkner and RC applications for hearing, were the very first issues to be addressed in the Initial Decision. App. 77a-89a. The ALJ's first conclusion was that misrepresentations had been made *in order to thwart or delay* the initiation of a competing broadcast service in Carrollton, Georgia. App. 107a. The ALJ's conclusions that Faulkner made misrepresentations were derived from its findings of fact on the delay issues.

CONCLUSION

For the foregoing reasons, the requested petition for a writ of certiorari should be granted.

Respectfully submitted,

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